Supreme Court, U.S.
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No. 061061

IN THE

Supreme Court of the United States

CHEVRON USA, INC.; CRAWFORD & COMPANY,
Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; CHRISTOPHER HEAVIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether substantial evidence supports an administrative law judge's finding that an employer and its insurer did not satisfy the contribution requirement set forth in Section 8(f) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, and therefore are not entitled to limit their liability for payment of permanent total disability benefits to an employee to a period of 104 weeks?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The named appellants in the Court of Appeals and the Petitioners herein are Chevron USA, Inc. and Crawford & Company. The named appellees in the Court of Appeals and the Respondents herein are the Director, Office of Workers' Compensation Programs, The United States Department of Labor, and Christopher Heavin.

Chevron USA, Inc. is a subsidiary of Chevron USA Holdings, Inc., Texaco, Inc., Chevron Investments, Inc. and Chevron Corporation. Crawford & Company does not have any parent companies and no publicly held company owns 10% or more of Crawford & Company's stock.

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Christopher Heavin v. Chevron USA, Inc. and Crawford & Company; Director, Office of Workers' Compensation Programs, United States Department of Labor (No. 04-0661) (reprinted as Appendix B)

TEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on October 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS

1. Longshore and Harbor Workers' Compensation Act - 33 U.S.C. Section 908(f)(1)

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of section 8(c)(1)-(20) [subsec. (c)(1)-(20) of this section], the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13) [subsec. (c)(13) of this section], the employer shall provide compensation for the lesser of such periods. In all other cases of total

permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of 8(c)(1)-(20) [subsec. (c)(1)-(20) of this section], the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of section 8(c)(13) [subsec. (c)(13) of this section], the employer shall provide compensation for the lesser of such periods. In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation for one hundred and four weeks only.

STATEMENT OF THE CASE

This matter arises from a claim filed by Christopher Heavin (hereinafter "Heavin") against Chevron USA, Inc. (hereinafter "Chevron" or "Petitioner") and Crawford & Company (hereinafter "Crawford" or "Petitioner") pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901 *et seq.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1333. On October 13, 1986, Heavin sustained multiple injuries to his body, including a bruised heart, multiple left rib fractures, contusion of the left lateral thoracic wall and upper abdomen, left hemothorax, ruptured spleen, laceration of the left kidney, fractured back, and fractured right femur when he fell approximately 40 feet from an offshore drilling platform.

On March 26, 1998, Petitioners filed a petition with the Office of Workers Compensation Programs, 18th Compensation District, seeking Section 8(f) Relief. Specifically, Petitioners sought to limit their liability for permanent disability benefits to 104 weeks, as Heavin had pre-existing impairments of his low back and kidneys. In support of their petition for Section 8(f) Relief, Petitioners relied on the medical reports of Dr. James T. London, board certified orthopedic surgeon, Dr. Paul Grodan, board certified internist, Dr. Nachman Brautbar, board-certified internist and nephrologist, as well as the medical reports and records of Lafayette General Hospital and Heavin's treating physicians.

Medical records from Lafayette General Hospital dated February 25, 1982 reflect that Heavin reported a five-year history of recurring back pain with radicular component into the right lower extremity. The symptoms were severe enough on February 25, 1982 that he was admitted to Lafayette General Hospital for a work-up. Heavin was

diagnosed as having a possible herniated nucleus proposus.

The records of Lafayette General Hospital also reflect that Heavin underwent a right pyeloplasty of the right kidney on March 4, 1982 and a right nephrectomy on March 8, 1983. As a result of the October 13, 1986 injury to his left kidney and the previous removal of his right kidney, Heavin now has only 25% of his kidney function remaining. Because Heavin only has part of one kidney, he cannot not be treated properly for his liver condition caused by hepatitis C. Similarly, Heavin cannot take over-the-counter drugs such as aspirin or Tylenol to control his back pain because said drugs will cause damage to his kidney over time. Heavin takes the prescription drug Darvocet for his back pain. Because Darvocet also damages the kidney, Heavin only takes the medication when his pain reaches a nine on a scale of one to ten, with ten being the most excruciating pain imaginable. In a medical report dated October 7, 1998, Dr. Grodan noted that Heavin's present kidney condition leaves him vulnerable to any nephrotoxic drugs or profound dehydration. Therefore, he must always be properly hydrated and avoid drugs such as nonsteroidal anti-inflammatories or anything that is potentially nephrotoxic.

In his reports dated August 24, 1998 and April 3, 2001, Dr. London opined that Heavin's low back and lower extremity pain constituted a pre-existing impairment. In his report dated August 24, 1998, Dr. London opined that the impairment which resulted from the October 13, 1986 injury combined with the impairment that was present in his lower back before October 13, 1986 to produce a greater total impairment than would have been present from the October 13, 1986 incident alone. In his August 24, 1998 report, Dr. London also found that Heavin's prior right nephrectomy produced a pre-existing wholeman impairment that made the impairment resulting from the October 13, 1986 injury

materially and substantially greater. A medical report from Dr. Grodan dated October 7, 1998 also indicated that because of his pre-existing right kidney problem, Heavin's medical condition and disability was substantially greater than it would have been from the October 13, 1986 injury alone. In addition, Dr. Brautbar opined that the absence of Heavin's right kidney played a role in contributing to his current impairment. Dr. Brautbar specifically noted that being hired with one kidney would have increased Heavin's risk for developing end stage renal failure and hemodialysis if he experienced blunt trauma to the abdomen.

The deposition of Dr. Grodan was taken on March 6, 2003. At that time, Dr. Grodan testified that a person who has lost one kidney will be considered impaired as he will only "have 50 percent of [his] original capacity." Dr. Grodan opined the removal of Heavin's right kidney in 1983 constituted a pre-existing permanent partial disability. Dr. Grodan further testified that a person with only one kidney must be more careful "about taking medication which can damage [the] kidneys because [that person does not] have as much reserve to fall back on." Dr. Grodan also testified that kidney infections may become a larger problem for someone with only one kidney.

On March 7, 2003, the deposition of Dr. London was taken. During the deposition, Dr. London testified that the removal of a right kidney would constitute a pre-existing permanent partial disability. Dr. London further testified that Heavin's current work restrictions arose from both the specific injury of October 13, 1986 and his pre-existing back disability. Dr. London also testified that pursuant to the American Medical Association*'s Guides to the Evaluation of Permanent Impairment*, 5th Edition, page 145, the removal of one kidney substantiates a 10% whole-man impairment.

On March 26, 1998, Petitioners filed a petition seeking Section 8(f) Relief with the Office of Workers' Compensation Programs, 18th Compensation District. At that time, Petitioners successfully established the first two requirements for an employer's entitlement to Section 8(f) relief. However, despite meeting the first and second elements, the District Director denied the Section 8(f) relief application, specifically finding that the third requirement of contribution was not met. An amended application for Section 8(f) relief was filed and served on April 23, 1999 to further establish the third requirement of contribution. The amended application for Section 8(f) relief was also denied by the District Director in a letter dated May 27, 1999.

On June 13, 2002, this matter was referred to the Office of Administrative Law Judges for formal hearing. The case proceeded to trial before the Honorable Jennifer Gee, Administrative Law Judge (hereinafter "ALJ"), from March 11-13, 2003 in San Diego, California. One of the issues at trial was Petitioners' entitlement to Section 8(f) Special Fund relief.

On December 11, 2003, the ALJ issued a Decision and Order Awarding Benefits to Heavin. The Decision and Order was filed and served on December 18, 2003. (See Appendix E.) In the Decision and Order, the ALJ held that Special Fund relief, pursuant to § 908(f) of the LHWCA, was not applicable and credit would not be taken by Petitioners. (*Id.*) The Decision and Order noted that Petitioners failed to prove the contribution element was met because Petitioners "presented less than persuasive medical records and testimony." The Decision and Order also indicated other possible causes for Heavin's pre-existing back pain and stated that Petitioners' medical experts applied the incorrect standard in determining the contribution requirement for Section 8(f) relief. (*Id.*)

On March 31, 2004, Petitioners filed a Further Petition for Reconsideration which addressed the issue of Section 908(f) Special Fund relief. The ALJ issued an Order Denying Request for Modification by Petitioners on May 7, 2004, which was filed and served on May 11, 2004. The ALJ held that the Further Petition for Reconsideration was untimely and, therefore, denied the request for reconsideration on the issue of Section 8(f) relief. (See Appendix D.)

Petitioners filed a Notice of Appeal with the Benefits Review Board (hereinafter "BRB")on May 19, 2004. The BRB issued a Decision and Order on April 26, 2005, affirming the Decision and Order Granting Permanent Total Disability Benefits, Order Granting Request for Modification of Decision, and Order Denying Request for Modification issued by the ALJ. (See Appendix B.) The BRB affirmed the ALJ's finding that Petitioners did not establish the contribution element. (*Id.*)

Based upon the final order of the BRB, Petitioners filed a Petition for Review with the U.S. Court of Appeals for the Ninth Circuit on June 22, 2005. The United States Court of Appeals for the Ninth Circuit subsequently transferred the Petition for Review to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit issued its opinion on October 26, 2006, affirming the decision of the BRB. (See Appendix A.)

ARGUMENT

Congress passed the LHWCA in 1927. (44 Stat. 1424, 1429 (1927).) From the outset, the LHWCA, through Section 8(f), was designed to promulgate a social policy of promoting the employment of workers with pre-existing permanent disabilities. Employers were encouraged to hire disabled workers in exchange for a reduction in liability for certain compensation. A witness to a congressional hearing in 1926 on the measure outlined the policy reason behind the LHWCA in the following manner:

> The second injury proposition is as much to the advantage of the employer and his interests as it is for the benefit of the employee. It protects the employer who has hired, say, a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with one eye from being denied employment on account of his being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also.

Hearings before Committee on the Judiciary, House of Representatives, S. 3170, 69th Cong., 1st Sess. (1926), p. 208; *see also Lawson v. Suwanee Fruit & Steamship Co*, 336 U.S. 198, 199 (1949).

Section 8(f) of the LHWCA was substantially amended by Congress in 1972. With the 1972 amendments, Congress reaffirmed the basic purpose of the Special Fund to protect

previously impaired workers. The Senate Committee on Labor and Public Welfare stated:

> Injury Following Previous Impairment
>
> The bill amends Section 8(f) of the Act in order to limit the burden on employers in so-called second injury cases. Many employers have an inaccurate impression regarding the liabilities for workmen's compensation when they employ handicapped workers. It is unfortunately a widespread belief that an employer is subject to burdensome compensation costs where a handicapped worker receives an injury at the new place of employment. The provision in the bill makes clearer that the employer's responsibility for the subsequent or second injury is limited to the scheduled award for the second injury or 104 weeks, whichever is greater. The remaining obligation to pay that employee where he is totally or partially disabled will fall upon the Special Fund existing under Section 44 of the Act. This method of spreading the risk among all employers is intended by the Committee to encourage the employment of handicapped workers.

S. Rep. No. 92-1125, 92nd Cong., 2nd Sess. 7 (1972).

In *C&P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977), the court reiterated that the purpose of Section 8(f), as amended in 1972, was to:

> [P]revent discrimination against handicapped workers in hiring and firing, a discrimination encouraged by the remainder of the Act were it not for §8(f). The Act makes the employer

> liable for compensation. Hence, the employer risks increased liability when he hires or retains a partially disabled worker. By virtue of the contribution of the previous partial disability, such a worker injured on the job may suffer a resulting disability greater than a healthy worker would have suffered. Were it not for the shifting of this increased compensation liability from the employer to the Special Fund under §8(f), the Act would discourage employers from hiring and retaining disabled workers.

See also, Director, OWCP v. Cargill, Inc., 709 F.2d 616, 618 (9th Cir. 1983); *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 201 (1949); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982); *Todd Pacific Shipyards v. Director, OWCP*, 913 F.2d 1426 (9th Cir. 1990); and *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420, 426 (1990).

Under Section 8(f) of the LHWCA, as amended in 1984, an employer may limit its liability for payment of permanent disability compensation if three elements are present: (1) the injured worker had an existing permanent partial disability before the most recent injury; (2) the injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and (3) the present permanent total disability is not due solely to the most recent injury. 33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143 (9th Cir. 1991).

In recent years, the zealous defense of the Special Fund by the Director has resulted in the continuous tightening of the requirements needed to obtain Special Fund relief. Of the three requirements, the contribution element has become the most difficult to satisfy. In its opinion in this case, the Fifth Circuit stated: "Broadly referring to Congress's desire to reduce discrimination against the partially disabled is no substitute for actually meeting section 8(f)'s demands. Public policy does not entitle Petitioners to section 8(f) relief because Petitioners failed to meet the contribution requirement." The Fifth Circuit, like other courts, has increasingly viewed the Section 8(f) defense as an attempt by the employer to "dump" claims in the Special Fund. Unfortunately, the courts seem to have lost sight of the overall purpose of the Special Fund, which is to encourage the hiring of disabled workers.

Review by this Court is warranted because the decisions by the courts below are contrary to the intent of Congress when it enacted Section 8(f). Based upon the current trend of the courts, it cannot be said that Section 8(f) continues to achieve its purpose of encouraging the retention and hiring of disabled workers. If Section 8(f) fails to provide any relief to employers, the statutory motivation to hire disabled workers will be greatly decreased. In keeping with Congressional intent, courts should construe Section 8(f) liberally and generally in favor of employers.

Here, the evidence in the record clearly shows that Petitioners have satisfied the contribution requirement as set forth in Section 8(f)(1) of the LHWCA. The evidence shows that were it not for the removal of Heavin's right kidney in 1983, Heavin would currently have more than 25% of his kidney function remaining. With two kidneys, Heavin would have been able to tolerate additional pain medications without having his kidneys fail. If Heavin were able to take the

additional pain medication needed to control his back pain and the resulting incontinence, he would be able to return to a suitable alternative form of employment and therefore would presently have a permanent partial disability rather than a permanent total disability. Thus, the evidence of record successfully demonstrates that Heavin's present permanent total disability is not solely due to the October 13, 1986 injury.

A decision to disallow Section 8(f) relief in a situation such as this, where the employer hires a disabled employee in spite of his pre-existing disability, will create a disincentive for employers on the waterfront to hire persons with pre-existing disabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JAMES P. ALECCIA
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CHEVRON USA, INC. and
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-61083
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
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Charles R. Fulbruge III
Clerk

CHEVRON USA, INC.;
CRAWFORD & CO, INSURANCE CARRIER,
Petitioners

v.

CHRISTOPHER HEAVIN; DIRECTOR,
OFFICE OF WORKERS' COMPENSATION
PROGRAMS, US DEPARTMENT OF LABOR,
Respondents.

Petition for Review of an Order of the
Benefits Review Board (04-0661)

Before DEMOSS, STEWART, and PRADO,
Circuit Judges.

PER CURIAM:*

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* Pursuant to 5th CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIRCUIT RULE 47.5.4.

Petitioners Chevron USA, Inc. ("Chevron") and Crawford & Co. ("Crawford") appeal the order of the Benefits Review Board ("BRB" or "the Board") affirming the administrative law judge's ("ALJ") decision to deny Petitioners' request for special fund relief under the Longshore and Harbor Workers' Compensation Act ("LHWCA") §8(f), 33 U.S.C. §§908(f), 944. The BRB's order contains no reversible error. The Board correctly applied the aw, and it properly concluded that the ALJ's factual findings were supported by substantial evidence on the record as a whole. We therefore AFFIRM the Board's order.

I. FACTUAL AND PROCEDURAL HISTORY

Christopher Heavin ("Heavin") began working for subsidiaries of Gulf Oil[1] on the day of his graduation from college in 1976. On October 13, 1986, while working as a facility operator, Heavin fell approximately forty feet from an offshore drilling platform. He suffered a bruised heart, punctured lungs and diaphragm, an injured liver, a laceration to his left kidney, and fractures to his ribs, back, hip, and right femur.

In February 1982, prior to his accident, Heavin was treated for back pain at Lafayette General Hospital. Heavin also suffered from pre-existing kidney problems. In March 1983, Dr. Charles Williams removed Heavin's right kidney due to a congenital deformity.

Heavin filed a claim for benefits arising from the injuries that he sustained from the October 13, 1986, accident against employer Chevron and Crawford, Chevron's insurance carrier, under the LHWCA, 33 U.S.C. § 901 et seq., as

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[1] Gulf Oil later merged with Cheron.

extended by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333 et seq. The ALJ issued a Decision and Order Granting Permanent Total Disability Benefits on December 11, 2003. Of relevance to this appeal, the ALJ denied Chevron and Crawford's petition for section 8(f) relief because the ALJ found that Chevron and Crawford failed to prove that Heavin's permanent total disability was not due solely to the injuries he sustained from the October 13, 1986, accident. The ALJ then issued a Decision and Order Denying Request for Modification dated May 7, 2004.

On May 20, 2004, Petitioners filed a timely notice of appeal with the BRB. On April 26, 2005, the Board issued its Decision and Order, which, among other things, affirmed the ALJ's decision to deny Petitioners' request for section 8(f) relief. Following the Board's decision, Petitioners filed a petition for review with the Ninth Circuit Court of Appeals on June 22, 2005. The Ninth Circuit transferred the case to this court under 28 U.S.C. § 1631 because Heavin sustained his injuries while working in the Gulf of Mexico.

The ALJ's Decision and Order Granting Permanent Total Disability Benefits resolved several issues related to Heavin's workers' compensation claim; however, the sole issue raised in this appeal is whether Petitioners have proved that they qualify for section 8(f)'s super fund relief.

II. STANDARD OF REVIEW

When considering an appeal of an ALJ's order, the BRB lacks statutory authority to "to engage in a de novo review of the evidence or to substitute its views for those of the ALJ." Ceres Marine Terminal v. Dir., 118 F.3d 387, 389 (5th Cir. 1997); see 33 U.S.C. § 921(b)(3). The BRB must accept the ALJ's findings unless they "are not supported by

substantial evidence in the record considered as a whole or unless they are irrational." Ceres, 118 F.3d at 389. Therefore, when reviewing a decision from the BRB, this court's "only function is to correct errors of law and to determine if the BRB adhered to its proper scope of review--i.e., has the Board deferred to the ALJ's fact-finding or has it undertaken de novo review and substituted its views for the ALJ's." Id. (quoting Avondale Shipyards, Inc. v. Vinson, 623 F.2d 1117, 1119 n.1 (5th Cir. 1980)). When conducting a review of the Board's order, this court must "independently examine the record to determine whether the ALJ's findings are supported by substantial evidence." Id. We determine whether the ALJ's findings were supported by substantial evidence because the LHWCA "has the effect of shifting deference away from the BRB and to the ALJ." Id. at n.1.

Substantial evidence is "that relevant evidence--more than a scintilla but less than a preponderance--that would cause a reasonable person to accept the fact finding." Dir. v. Ingalls Shipbuilding, Inc., 125 F.3d 303, 305 (5th Cir. 1997). In other words, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Louis Dreyfus Corp. v. Dir., 125 F.3d 884, 886 (5th Cir. 1997).

III. DISCUSSION

Petitioners contend that the Board and the ALJ's finding that Petitioners failed to satisfy section 8(f)'s requirements is not supported by substantial evidence. Specifically, Petitioners point to evidence which they argue clearly demonstrates that Heavin's pre-existing back and kidney problems contributed to his current permanent total disability. Petitioners also argue that the ALJ erred by focusing on the fact that their experts addressed the incorrect

standard for satisfying section 8(f). Petitioners maintain that the ALJ should have delved into the record to determine whether Petitioners produced enough evidence to prove that they met section 8(f)'s requirements.

Traditional workers' compensation regimes follow the "aggravation rule," which makes an employer liable for an employee's entire disability even though the disability resulted from a current employment injury and a pre-existing impairment. Ceres, 118 F.3d at 389. However, section 8(f) limits the employer's liability for a work-related permanent disability if the employer can show that the employee had a pre-existing permanent partial disability that contributed to the current employment-related disability. Id.; see 33 U.S.C. § 908(f). After 104 weeks, section 8(f) shifts liability from the employer to a special fund financed through contributions from employers[2] in the industry. Ingalls, 125 F.3d at 306 n.4; see 33 U.S.C. §§ 908(f)(1), 944.

The elements that an employer must establish to take advantage of section 8(f)'s super fund provision depend on whether the employee suffered a permanent partial disability or a permanent total disability. Two R Drilling Co. v. Dir., 894 F.2d 748, 750 (5th Cir. 1990). In this case, the ALJ determined that Heavin suffered a permanent total disability[2] as a result of his work-related injuries from the October 13, 1986, accident. Thus, Petitioners must establish that Heavin had: "(1) an existing permanent partial disability before the

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[2] Under the LHWCA, a permanent total disability means that the claimant has suffered injuries which prevent him from reentering the labor force. See Ceres, 188 F.3d at 390-91; see also 33 U.S.C. § 902(10) (stating that "disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment").

employment injury; (2) that the permanent partial disability was manifest to the employer; and (3) that the current disability is not due solely to the employment injury." Id. (citations omitted). The employer bears the burden of proving these elements. Id.; Louis Dreyfus, 125 F.3d at 887.

The ALJ determined that Petitioners had satisfied the first two of section 8(f)'s three requirements. Therefore, the only disputed issue on appeal is whether Petitioners proved that Heavin's current disability is not due solely to the employment injury.[3] Petitioners contend that they met the contribution requirement because Heavin's October 13, 1986, accident would not have rendered him permanently totally disabled absent his preexisting back and kidney disabilities. Petitioners also argue that this court should grant them section 8(f) relief as a matter of public policy to avoid discouraging employers from hiring employees with pre-existing permanent partial disabilities.

A. The Contribution Requirement

Petitioners maintain that the Board and the ALJ erred by finding that it did not meet the contribution requirement. To support its claim, Petitioners cite to a medical report by Dr. James London in which he opined that Heavin's injuries from the October 13, 1986, accident combined with his pre-existing back impairment to produce a greater total impairment than would have resulted from the work injury alone. Petitioners also rely on Dr. London's deposition testimony in which he stated that Heavin's current work restrictions arose from both the October 13, 1986, injuries and his pre-existing back impairment.

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[3] This element is also known as the contribution requirement. See Ceres, 118 F.3d at 389.

In addition to the pre-existing back condition, Petitioners maintain that Heavin's pre-existing kidney disability contributed to his present disability. A medical report authored by Dr. London dated August 25, 1998, stated that Heavin's pre-existing congenital kidney condition made his injuries from the October 13, 1986, accident materially and substantially greater. Petitioners also rely on a medical report by Dr. Nachman Brautbar, which opines that the removal of Heavin's right kidney in 1983 was a contributing factor to his current impairment because being hired with one kidney increases the risk for developing renal failure and hemodialysis. Finally, Petitioners cite a medical report by Dr. Peter Grodon in which he noted that Heavin's kidney condition left him vulnerable to nephrotoxic drugs and profound dehydration. Petitioners use Dr. Grodon's report to argue that the pre-existing kidney condition contributed to Heavin's current permanent total disability. Petitioners maintain that if Heavin still had a right kidney, he would be able to reenter the labor market because he would have higher kidney function, which would allow him to take medications that would enable him to control his back pain and incontinence.

Contrary to Petitioners' arguments, the ALJ found that Heavin's pre-existing back condition did not contribute to his current permanent total disability. The ALJ cited a medical report from Dr. Blanda, which noted that Heavin's back pain resulted from kidney problems. A report from Dr. Raymond Linovitz also suggested that Heavin's back problem really arose from his kidney problems or possibly a sciatic nerve problem. The ALJ credited Dr. Linovitz's opinion that a 1982 medical record referring to back pain with no follow-up treatment was insufficient to show that Heavin suffered from a pre-existing back condition. The opinions of Drs. Blanda and Linovitz provide substantial evidence--such relevant evidence

as a reasonable mind might accept as adequate to support a conclusion--to sustain the ALJ's determination that Heavin's pre-existing back condition, if he even had one, did not contribute to his present disability. See Louis Dreyfus, 125 F.3d at 886.

There was also substantial evidence in the record for the ALJ to conclude that Heavin's pre-existing kidney problems did not contribute to his present disability. Dr. Grodon testified that "You have a perfect example of people donating a kidney for transplant, and they have one kidney left, and they live normal lives...[Heavin] does not have a disability because of his kidneys. Even now." Heavin v. Chevron USA, Inc., 2002-LHC-2122, 07-105398, at 27 (Dep't of Labor Dec. 11, 2003). Put differently, only having one kidney does not limit someone from the labor market. Dr. Grodon also stated that "considering the substantial trauma to his body, in my opinion, both kidneys would have been damaged, in all medical probability to an identical degree." Id. Therefore, even assuming Heavin's kidney problems did limit him for the labor force, the October 13, 1986, accident was so traumatic that it alone would have been sufficient to render Heavin permanently totally disabled. The ALJ concluded from this testimony that Heavin's pre-existing kidney problem played no role in the severity and extent of his permanent condition. In other words, Heavin's pre-existing kidney problems did not contribute to his present inability to enter the labor force.

The record yielded substantial evidence to support the ALJ's finding that neither Heavin's pre-existing back condition, if he had one, nor his pre-existing kidney problems contributed to his present inability to reenter the labor force. The ALJ credited a medical report from Dr. Grodon dated June 18, 2001, which stated that Heavin's orthopedic

limitations, not his liver or kidney disorders, limited him from the labor market. Thus, Petitioners' own expert, Dr. Grodon, provided the substantial evidence for the ALJ to determine that Heavin's pre-existing kidney condition did not contribute to his current permanent total disability.

Having reviewed both Petitioners' arguments and the ALJ's decision and order, Petitioners establish--at best--that a fact finder could draw multiple inferences from the evidence in the record. The well-established law in this circuit is that whether "the facts may permit diverse inferences is immaterial. The administrative law judge alone is charged with the duty of selecting the inference which seems most reasonable and his choice, if supported by the evidence, may not be disturbed." Presley v. Tinsley Maint. Serv., 529 F.2d 433, 436 (5th Cir. 1976); Mendoza v. Marine Pers. Co., 46 F.3d 498, 500 (5th Cir. 1995). It is the ALJ who "determines the weight to be accorded to evidence and makes credibility determinations." Mendoza, 46 F.3d at 500. Further, "where the testimony of medical experts is at issue, the ALJ is entitled to accept any part of an expert's testimony or reject it completely." Id. at 501; Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 945 (5th Cir. 1991). In this case, the ALJ's selection of inferences was reasonable and supported by the evidence. Therefore, this court cannot disturb the ALJ's factual findings.

Petitioners argue that the ALJ erred by focusing on the fact that their experts' opinions did not address the correct legal standard for permanent total disability cases. Petitioners' experts, Drs. London and Grodon, stated that Heavin's current injury is materially and substantially greater because of his pre-existing injuries. The ALJ correctly noted that those opinions would be relevant to a permanent partial disability case, but not to Heavin's permanent total disability case. See Two R Drilling, 894 F.2d at 750. Petitioners contend that

instead of focusing on the fact that their experts addressed the incorrect standard, the ALJ should have delved into the record to determine whether Petitioners had proved the contribution requirement for a permanent total disability.

Petitioners' argument fails for two reasons. First, in permanent total disability cases, an employer cannot establish the contribution requirement by simply showing that the employee's current disability is greater than it would have been absent the employee's pre-existing impairments. Ceres, 118 F.3d at 390; Ingalls, 125 F.3d at 306-07. Instead, the employer has to prove that the employee would not be totally disabled--i.e., unable to reenter the labor force--without his prior injury. Ingalls, 125 F.3d at 307. Second, the ALJ's decision demonstrates that the ALJ looked beyond the fact that Petitioners' experts addressed the incorrect standard and that the ALJ delved into the record evidence when making factual determinations. For example, the ALJ discredited Dr. Grodon's testimony that Heavin's current disability is substantially greater than it would have been from the October 13, 1986, accident alone not only because this testimony was irrelevant to the correct standard, but also because it was conclusory and contradicted some of his other statements. Heavin, 2002-LHC-2122, 07-105398 at 27.

B. Public Policy

Petitioners argue that this court should grant them section 8(f) relief as a matter of public policy because Congress enacted section 8(f) to reduce discrimination against handicapped workers. In order to further congressional intent, Petitioners contend that this court should construe section 8(f) liberally in favor of employers.

Almost all authorities agree that Congress enacted section 8(f) to diminish an employer's incentive to discriminate against partially disabled workers. See Lawson v. Suwanee Fruit & S.S. Co., 336 U.S. 198, 201 (1949); Ceres, 118 F.3d at 389. Section 8(f) strikes a balance between encouraging employers to hire partially disabled workers and avoiding a moral hazard problem in which employers would seek to shift liability to the special fund in cases where there were only insignificant pre-existing injuries. Ingalls, 125 F.3d at 306. Therefore, the elements that an employer must prove to benefit from section 8(f) reflect Congress's judgment about the best way to achieve the public policy goal of reducing discrimination against disabled workers. Broadly referring to Congress's desire to reduce discrimination against the partially disabled is no substitute for actually meeting section 8(f)'s demands. Public policy does not entitle Petitioners to section 8(f) relief because Petitioners failed to meet the contribution requirement.

IV. CONCLUSION

For the reasons stated above, we AFFIRM the decision of the Benefits Review Board.

AFFIRMED.

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, D.C. 20013-7601

NOT-PUBLISHED

DATE ISSUED APR 26 2005

BRB No. 04-0661

CHRISTOPHER HEAVIN
Claimant-Respondent

v.

CHEVRON USA, INCORPORATED
and
CRAWFORD & COMPANY
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR
Respondent

DECISION and ORDER

Appeal of the Decision and Order Granting Permanent Total Disability Benefits, the Order Granting Request for Modification of Decision, and the Order Denying Request for Modification of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Graham M. Kelly, Jr., Coronado, California, and Eric Dupree (Dupree Law, PLC), San Diego, California, for claimant.

James P. Aleccia and Jeanne S. Kuo (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers'' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Permanent Total Disability Benefits, the Order Granting Request for Modification of Decision, and the Order Denying Request for Modification (2002-LHC-2122) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law; if they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §§921(b)(3).

Claimant was injured on October 13, 1986, during the course of his employment for employer as a facility operator on an offshore oil platform when he fell approximately 40 feet during a rainstorm. Claimant fractured his ribs, back, hip, and right femur. He also sustained a ruptured spleen and injuries to other internal organs. Claimant underwent surgery on his diaphragm, spleen, back, and right leg, and hemodialysis to

restore his left kidney function.[1]

Dr. Linovitz became claimant's treating physician for his back condition in 1988. He performed additional back surgery in August 1988 and in June 1989, when the plate in claimant''s right leg also was removed. Claimant underwent multiple psychological examinations in 1993, from which it was determined that claimant has an organic mental disorder and an affective disorder. A comprehensive neuropsychiatric examination in 1997 by Dr. Addario revealed that claimant sustained a mild traumatic brain injury due to the October 1986 work injury; in January 2003 Dr. Addario recommended counseling and medication for depression and anxiety. Claimant was diagnosed in 1997 with the hepatitis C virus related to the approximately 48 blood transfusions claimant received immediately after his work injury to alleviate internal bleeding. Claimant underwent Interferon treatment for hepatitis C from March 1998 to March 1999. In March 2001, Dr. Linovitz opined that claimant''s back symptomatology is worsening, and that claimant was at risk for developing advanced degenerative changes, stenosis, and further neurologic impairment.

In her decision, the administrative law judge found that claimant's work injuries reached maximum medical improvement on July 6, 1988. The administrative law judge credited the opinion of Dr. Linovitz that claimant''s condition has not improved since the day he first examined claimant. The administrative law judge noted that it is uncontroverted that claimant is unable to return to his usual employment as a facility operator. The administrative law judge found that employer failed to show the availability of suitable alternate employment that claimant is capable of performing.

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[1] Claimant's right kidney had been removed in 1983 due to a congenital deformity.

Additionally, the administrative law judge credited the opinions of Drs. Linovitz and Addario that the combination of claimant's physical injuries, metabolic factors, pain disorders, and psychiatric condition render claimant unable to work. The administrative law judge also found claimant totally disabled from March 13, 1998, to March 15, 1999, while he underwent Interferon treatment for hepatitis C. The administrative law judge therefore awarded claimant permanent total disability benefits commencing July 6, 1988.

The administrative law judge determined claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), relying on claimant's wages for employer after it merged with claimant's former employer, Gulf Oil Company (Gulf), and claimant was promoted from pumper/gauger to facility operator, to derive an average weekly wage of $1,009.63. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), finding that employer failed to establish that claimant's pre-existing back pain and removal of his right kidney contribute to his permanent total disability. With regard to medical benefits, the administrative law judge found claimant entitled to reimbursement from employer for sums he personally paid for a month of Interferon treatment. However, the administrative law judge determined that claimant is not entitled to receive from employer the value of 11 months of Interferon treatment that the University of California, San Diego, Hospital provided to claimant free of charge, but that the hospital is entitled to payment from employer. Employer was further ordered to authorize all requested medical evaluations, treatment, and prescriptions relating to the claimant's medical conditions referenced in the decision, including claimant's psychological/psychiatric deficiencies.

In her Order Granting Request for Modification of Decision issued on February 26, 2004, the administrative law judge additionally awarded claimant compensation for temporary total disability from the date of injury, October 14, 1986, to July 5, 1998. The administrative law judge granted claimant's request for clarification that claimant should be awarded compensation for permanent total disability, instead of temporary total disability, while he received Interferon treatment from March 13, 1998, to March 15, 1999. The administrative law judge found claimant entitled to reimbursement from employer for the $7,050 cost of medical testing performed by Dr. Wegman, plus interest. Finally, the administrative law judge found that claimant is entitled to an additional assessment pursuant to Section 14(e), 33 U.S.C. §914(e). The administrative law judge found that employer failed to timely controvert claimant's disputing the average weekly wage employer utilized to voluntarily pay claimant compensation from the date of injury.

In her Order Denying Request for Modification issued on May 7, 2004, the administrative law judge rejected employer's contention that claimant should receive compensation for temporary total disability while he underwent Interferon treatment. The administrative law judge also denied reconsideration of the Section 14(e) assessment. Finally, the administrative law judge rejected employer's motion for reconsideration of the denial of Section 8(f) relief. The administrative law judge found that employer's petition for reconsideration in this regard was not timely filed. Moreover, the administrative law judge found that employer did not present any argument that would warrant changing her finding that it is not entitled to Section 8(f) relief.

On appeal, employer challenges the administrative law judge's findings regarding the date of maximum medical

improvement, suitable alternate employment, average weekly wage, Section 8(f) relief, the award of permanent total disability benefits from March 13, 1998, to March 15, 1999, and her imposition of a Section 14(e) assessment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance in all other respects.

Maximum Medical Improvement

Employer initially contends that the administrative law judge erred by finding that claimant's October 13, 1986, work injury reached maximum medical improvement on July 8, 1988, rather than on June 8, 1995, when Dr. London stated claimant reached maximum medical improvement and was capable of sedentary employment. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

In her decision, the administrative law judge found that the testimony of claimant's treating physician, Dr. Linovitz, is entitled to special weight.[2] The administrative law judge reasoned that Dr. Linovitz had treated claimant for over 10 years, he maintained well-documented treatment notes, and he presented persuasive testimony that, in hindsight, claimant's

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[2] The administrative law judge also credited Dr. Linovitz's opinion based on his credentials as an orthopedic surgeon who specializes in spinal disorders and on his testimony that claimant is not feigning his condition. CX 24 at 5, 24.

back condition has not improved, but has declined, since July 6, 1988, when he first examined claimant.[3] *See* CX 24 at 6-11, 29-30; EX 19. The administrative law judge also found Dr. Linovitz's opinion supported by the medical evidence of claimant's deteriorating condition. Specifically, Dr. Linovitz diagnosed claimant with arachnoiditis, scoliosis, and worsening dysesthesias subsequent to first examining claimant in July 1988. CX 2 at 36, 58, 100. The administrative law judge also credited claimant's diagnosis in February 1993 of a post-traumatic psychiatric condition, and his diagnosis of hepatitis C in 1997. CXs 1 at 6; 5 at 196. Finally, the administrative law judge credited evidence that claimant's psychiatric condition worsened from 1993 to 2003. CXs 1 at 4; 7 at 205-206; 20 at 550-552. Based on this evidence, the administrative law judge found that any improvement in claimant's condition physically from 1989 to 1993 was limited to specific symptoms and was short-lived, whereas claimant's work-related physical and psychological condition progressively worsened after July 8, 1988. Decision and Order at 14.

The Board is not empowered to reweigh the evidence, and the administrative law judge's weighing of the evidence must be affirmed if it is rational and supported by substantial evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge acted within her discretion as fact-finder to accord the greatest weight to the opinion of claimant's treating physician, Dr. Linovitz. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998),

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[3] Dr. Linovitz initially stated on June 8, 1995, in response to a question from employer, that claimant was permanent and stationary with regard to his work injuries. On deposition, he explained that in hindsight, claimant has not improved since at least 1988. CX 24 at 29.

amended, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). Moreover, the testimony of Dr. Linovitz, and the credited medical evidence that claimant's work-related physical and psychological condition worsened after July 8, 1988, constitutes substantial evidence from which the administrative law judge rationally concluded that claimant's work injury had reached maximum medical improvement at the time of Dr. Linovitz's initial evaluation. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988). As the administrative law judge's decision to credit this evidence is within her discretion, *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2 d Cir. 1961), we affirm the administrative law judge's finding that claimant's work injury reached maximum medical improvement on July 8, 1988. *See generally Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7 th Cir. 2000).

We also affirm the administrative law judge's rejection, on reconsideration, of employer's contention that claimant should have been awarded compensation for temporary total disability from March 13, 1998, to March 15, 1999, rather than for permanent total disability, while he received Interferon treatment. Order Granting Request for Modification of Decision and Order at 2-3; Order Denying Request for Modification at 2. The administrative law judge correctly awarded claimant compensation for permanent disability from the date of maximum medical improvement, notwithstanding that claimant was additionally disabled from the temporary physical side-effects of Interferon treatment. *See generally Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS

22(CRT) (5th Cir. 1994). A compensation award for permanent partial disability lapses during a period of temporary total disability inasmuch as the claimant is entitled to compensation for his complete inability to work. *See generally Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). This rationale, however, is inapplicable in circumstances such as those here, where claimant sustained a period of temporarily totally disabling symptoms after the date the administrative law judge found that claimant became permanently totally disabled due to his work injury. *See generally Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Suitable Alternate Employment

We next address employer's appeal of the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. Section 802.211(b) of the Board's regulations states, in pertinent part:

> Each petition for review shall be accompanied by a supporting brief . . . which: Specifically states the issues to be considered by the Board; presents . . . an argument with respect to each issue presented with references [to the record]; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result.

20 C.F.R. §802.211(b). The Board has stated previously that a brief filed by a party represented by counsel must address why the administrative law judge's decision is not supported by substantial evidence or in accordance with law. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227, 229 (1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988).

"[M]ere assignment of error is not sufficient to invoke Board review." *Carnegie v. C&P Telephone Co.*, 19 BRBS 57, 58-59 (1986).

In this case, employer's contention regarding the extent of claimant's disability is taken virtually verbatim from the Post-Hearing Brief submitted to the administrative law judge. *See* Employer's Post Trial Brief at 23-26. Employer fails to address the administrative law judge's findings or identify any error committed by the administrative law judge in finding that employer failed to establish the availability of suitable alternate employment. As employer has failed to raise a substantial issue for the Board to review in relation to the administrative law judge finding that employer did not establish the availability of suitable alternate employment, we affirm the administrative law judge's award of compensation for permanent total disability from July 8, 1988. *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc,* 31 BRBS 19 (1997); *Collins*, 23 BRBS at 228-229; *Carnegie*, 19 BRBS at 59.

Average Weekly Wage

Employer next contends that the administrative law judge erred in determining that claimant's average weekly wage at the date of injury is $1,009.63. Section 10 of the Act, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous, and he is a five or six day per week worker. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be

reasonably and fairly applied.

Employer argues that the administrative law judge erred by not applying Section 10(a) since claimant was employed for substantially the whole of the year preceding the October 13, 1986, work injury. Specifically, employer asserts that the administrative law judge should have credited claimant's total earnings during 1986. Claimant submitted 1986 W-2 wage forms showing that he earned $19,715.39 for Gulf, and $15,144.44 for employer. CX 15 at 266-267; *see also* Tr. at 87-93. Employer contends that the sum of these wages, $34,859.83, should be divided by 52 to derive an average weekly wage of $670.38.

While Section 10(a) may be applied when an employee has worked substantially the whole of the year immediately preceding his injury, for this or another employer, it requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. Claimant's 1986 W-2 statements are not sufficient evidence from which the administrative law judge could rationally derive claimant's average daily wage from January 1 to October 13, 1986, as there is no evidence of the number of days he worked during this period. *See Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999)(decision on recon.), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Moreover, the record establishes that claimant was not a five or six day per week employee; rather he worked seven days on and seven days off. *See* CX 19 at 507. Section 10(a) therefore cannot be applied. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Accordingly, the administrative law judge properly utilized Section 10(c) to calculate claimant's average weekly wage.

Section 10(c) of the Act is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §§910(b), can be reasonably and fairly applied.[4] *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 2000). It is well established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part,* 600 F.2d 1288 (9th Cir. 1979). The goal of Section 10(c) is to calculate a reasonable approximation of claimant's annual wage-earning capacity at the time of the injury. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51 (CRT) (5th Cir. 1997); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In this case, the administrative law judge determined that claimant's average weekly wage is $1,009.63 by dividing claimant's 1986 earnings for employer of $15,144.44 by the number of weeks he was employed by employer as a facility operator. Decision and Order at 25. The administrative law judge found that claimant's average weekly wage in 1986 of $758.28 while he was employed by Gulf corroborates claimant's testimony that he was promoted from pumper/gauger to facility operator shortly after Gulf merged with employer. Tr. at 90-91. The administrative law judge found that claimant's average weekly wage should reflect the pay increase received after his promotion.

It is proper for a Section 10(c) computation to reflect an increase in wages claimant received before the injury. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104

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[4] No party contends Section 10(b) is applicable in this case and there is no evidence in the record of the wages of similarly situated employees. 33 U.S.C. §910(b).

(1989); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986). The use of claimant's wage rate at the time of injury fully contemplates claimant for the earnings he lost due to his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert denied*, 449 U.S. 905 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). As the administrative law judge's calculation of average weekly wage under Section 10(c) reasonably approximates claimant's annual earning capacity at the time of injury, we reject employer's assertion of error, and we affirm the administrative law judge's finding, as it is supported by substantial evidence.[5] *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

SECTION 14(e)

Employer contends that the administrative law judge erred in awarding claimant a Section 14(e) assessment. 33 U.S.C. §914(e). In her Order Granting Request for Modification of Decision, the administrative law judge found that employer was first notified by the Department of Labor (the Department) on March 21, 1997, of a dispute regarding claimant's average weekly wage. CX 14 at 247. The administrative law judge found that this issue was addressed by the parties at an informal conference held three days later

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[5] Employer contends that the administrative law judge erred insofar as claimant was promoted to facility manager in 1986 while he was employed by Gulf. *See* Tr. at 90-93. Any error by the administrative law judge with respect to the date claimant was promoted is harmless, however, because the record evidence is uncontroverted that claimant earned a higher average weekly wage with employer than he did with Gulf.

on March 24, 1997. The administrative law judge credited a letter from the Department stating the substance of the informal conference, in which employer's insurance carrier was directed to provide the parties with a copy of claimant's wage records for the year prior to the date of injury so that claimant's average weekly wage could be calculated. CX 14 at 261. The administrative law judge further found that employer did not file a notice of controversion until July 29, 1999. The administrative law judge therefore concluded that claimant is entitled to a Section 14(e) assessment on the amount of additional compensation for which employer was found liable from the date of injury to March 24, 1997. Order Granting Request for Modification of Decision at 5-6.

Where an employer is paying benefits and a dispute exists between the parties as to the amount of compensation due, employer has 28 days to pay the amount demanded or 14 days to file a notice of controversion in order to avoid incurring a 10 percent assessment on the amount due under Section 14(e). *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). In this case, the administrative law judge found that, three days after employer received notice that claimant disputed the average weekly wage at which employer was voluntarily paying him compensation, the parties attended an informal conference where the issue was addressed. The purposes of Section 14(e) are to encourage the prompt payment of benefits and to act as an incentive to induce employer to bear the burden of bringing any compensation disputes to the attention of the Department. *Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), *aff'd sub nom., Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992). Therefore, it is well established that, absent the filing of a notice of controversion, employer's liability for a Section 14(e) assessment terminates

on the date an informal conference addressing the disputed issue is held, inasmuch as the dispute is brought to the attention of the Department at that time. *See generally Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). In this case, the purpose of Section 14(e) to timely bring compensation disputes to the attention of the Department was fulfilled by the informal conference on March 24, 1997, because it was conducted within the 14-day statutory period for employer to file its notice of controversion. We hold that the March 24, 1997, informal conference therefore was the *de facto* date at which employer timely provided a notice of controversion. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Accordingly, the administrative law judge's finding that employer is liable for a Section 14(e) assessment on the amount of unpaid compensation due from the date of injury to March 24, 1997, is reversed.[6]

SECTION 8(f)

Lastly, employer argues that the administrative law judge erred in finding that it did not establish the contribution element necessary for Section 8(f) relief. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent

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[6] We therefore need not address employer's contention that the administrative law judge, in her Order Granting Request for Modification of Decision, essentially imposed a Section 14(f) assessment, 33 U.S.C. §914(f), on the amount it owed claimant pursuant to Section 14(e)

total disability is not due solely to the subsequent work injury. *See Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *see also Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). In order to establish the contribution element, employer must show, by medical or other evidence, that claimant's subsequent injury alone would not have caused claimant's permanent total disability. *See Two "R" Drilling Co.*, 894 F.2d at 750, 23 BRBS at 35(CRT); *see also Ceres Marine Terminals*, 118 F.3d at 389-90, 31 BRBS at 93(CRT); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2 d Cir. 1992). In denying employer Section 8(f) relief, the administrative law judge assumed that claimant had pre-existing back pain, and that claimant's right kidney was removed on March 7, 1983, and she found that these medical conditions were manifest to employer. However, the administrative law judge found that employer did not establish that claimant's permanent total disability is not due solely to the October 13, 1986, work injury. Decision and Order at 26-28.

We affirm the administrative law judge's finding that employer did not establish the contribution element as it is supported by substantial evidence. *See Ceres Marine Terminals*, 118 F.3d 387, 31 BRBS 91(CRT); *Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT). The administrative law judge credited the opinion of Dr. Blanda, which attributed claimant's pre-existing back pain to his urinary and kidney problems that ultimately led to the removal of his right kidney. EXs 17 at 663-665; 19 at 974. The administrative law judge found, however, that the opinion of Drs. Grodan and London that the removal of claimant's right kidney substantially contributes to claimant's current disability are insufficient to establish that claimant is not totally disabled

due to the work injury alone. *See* EXs 24 at 20-21; 25 at 44. This finding is rational, as the contribution element is not established where the work injury alone is totally disabling and a pre-existing condition merely combines with the work injury to make claimant's physical condition even worse or more painful. *Ceres Marine Terminals*, 118 F.3d 387, 31 BRBS 91(CRT). The opinion of Dr. London does not address the extent of claimant's disability due to his work injury alone. Moreover, the administrative law judge observed that Dr. Grodan inconsistently opined that the removal of claimant's right kidney does not affect claimant's current disability, which is due to his orthopedic limitations. CX 4 at 150. As the administrative law judge's finding that employer did not establish that claimant is not totally disabled due to the work injury alone is supported by substantial evidence, we reject employer's contention that the administrative law judge erred in finding that the contribution element necessary for Section 8(f) relief is not established. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Dominey*, 30 BRBS 134.

Accordingly, the administrative law judge's finding that employer is liable for a Section 14(e) assessment on the amount of unpaid compensation due from the date of injury to March 24, 1997, is reversed. In all other respects, the administrative law judge's Decision and Order Granting Permanent Total Disability Benefits, Order Granting Request for Modification of Decision, and Order Denying Request for Modification are affirmed.

SO ORDERED.

/s/ Nancy S. Dolder

NANCY S. DOLDER, Chief
Administrative Appeals Judge

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Judith S. Boggs

JUDITH S. BOGGS
Administrative Appeals Judge

U.S. Department of Labor
Office of Administrative Law Judges
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ISSUE DATE: 07-May 2004

CASE NO.: 2002-LHC-02122
OWCP NO.: 07-105398

In the Matter of:

CHRISTOPHER HEAVIN,
Claimant,
vs.
CHEVRON, U.S.A., INC.,
Employer,

CRAWFORD & COMPANY,
Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest

Appearances: Eric A. Dupree, Esquire,
For the Claimant

James P. Aleccia, Esquire
For the Employer/Carrier

Pamela W. McKee, Esquire
For the Party in Interest

Before: Jennifer Gee
Administrative Law Judge

ORDER DENYING REQUEST FOR MODIFICATION

This is an action for benefits under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901 *et seq.* ("the Act"). I issued a Decision and Order Granting Permanent Total Disability Benefits ("Initial Decision") to the Claimant on December 11, 2003. After receiving the decision, the Claimant filed a Motion for Reconsideration on December 28, 2003 asking for:

1. A finding that the Claimant is entitled to temporary total disability benefits from the date of the injury through July 5, 1988;

2 Clarification concerning the Claimant's entitlement to permanent total disability benefits from March 13, 1998, through March 15, 1999, when he was receiving his Interferon treatment;

3 A finding that the Claimant is entitled to reimbursement for the cost of medical testing performed by Dr. Thomas J. Wegman; and

4 A finding that the Claimant is entitled to penalties and interest on the monies owed to him.

On February 26, 2004, I granted the Motion for Reconsideration and made the findings the Claimant requested. I modified the order in my Initial Decision to be consistent with the modified findings.

On March 12, 2004, the Respondents' filed a Petition for Reconsideration asking that I reconsider my ruling and find that:

1. The claimant is entitled to temporary, not permanent, total disability benefits from March 13, 1998, through March 15, 1999; and

2. That the Claimant is not entitled to penalties under §14(e) of the Act.

The Claimant filed an opposition to the Respondent's Petition for Reconsideration, asking me to affirm my modified findings.

On March 31, 2004, the Respondents filed a "Further Petition for Reconsideration asking that I also reconsider my findings in the Initial Decision that the Employer is not entitled to any relief under Section 8(f) of the Act. The Director of the Office of Workers' Compensation Programs opposes the second petition for reconsideration, arguing that it is untimely filed.

The Claimant's Entitlement to Permanent Total Disability from March 13, 1998 through March 15, 1999

The Respondents' request for reconsideration of this finding is DENIED. As stated in my order granting the Claimant's Motion for Reconsideration, I found that the Claimant was totally disabled from March 13, 1998 through March 15, 1999, for **two** reasons. I found that he was permanent and stationary beginning July 6, 1988, and that he was permanently and totally disabled because of his injury from that day forward, **including** the period from March 13, 1998, through March 15, 1999. I also found that he was temporarily totally disabled during the same period because of his Interferon treatment. These were alternative findings. The second finding was made because the Claimant had asked for such a finding and was not intended to and will not replace the

finding that he was permanently and totally disabled during that time period because of his 40' fall on the oil drilling platform.

The §14(3) Penalties

In my order granting the Claimant's motion for reconsideration, I found that the Employer had notice as early as March 21, 1997, that there was an issue over the amount of the Claimant's benefits. The Respondents' argue that §14(e) penalties should not be assessed against the Employer because the issue of the Claimant's average weekly wage was not raised and clearly disputed between the parties until the 1999 informal conference. However, they acknowledge that on March 21, 1997, the Claimant filed a positional statement with the Department of Labor indicating that the "amount of benefits" was an issue. They argue that they were not truly on notice that there was an issue because the Claimant failed to provide sufficient documentation to substantiate his claim that the Claimant should have a higher average weekly wage and he also failed to provide a method for computing the Claimant's average weekly wage.

I do not find this argument persuasive. Though the Claimant did not provide the documentation to substantiate the claim, the Employer was on notice that there was a dispute and could have filed the Notice of Controversion, if only based on an argument that there was inadequate documentation to support a claim for more benefits. Thus, the Respondents' request for reconsideration of this finding is DENIED.

Petition for Section 8(f) Relief

In the Further Petition for Reconsideration, the Respondents ask that I reconsider the finding in my Initial

Decision that the employer is not entitled to Section 8(f) relief. This request is also DENIED.

As pointed out by the Director of the Office of Workers' Compensation Programs, this Further Petition for Reconsideration was not timely filed. While the Respondents' first Petition for Reconsideration was timely filed after I granted the Claimant's Motion for Reconsideration, the Further Petition for Reconsideration was not filed within 10 days of the service of that order. Its filing should not be allowed to relate back to the Petition for Reconsideration since it raises a wholly separate issue for reconsideration that was not mentioned in the Respondent's timely filed Petition for Reconsideration. It is not a modification of the timely filed petition.

Instead, it asks for reconsideration of an issue that was not the subject of the February 2004 modifications made to my Initial Decision. It asks for reconsideration of a finding made in the Initial Decision which was filed in December 2003. As pointed out by the Director of the Office of Workers' Compensation Programs, this reconsideration request should have been filed within 10 days after service of the Initial Decision by the District Director.

Regardless of the timeliness of the request, the Respondents' have not presented any arguments that warrant changing my findings on this issue. I found in my Initial Decision that the employer failed to establish its entitlement to Section 8(f) relief. The discussion in my initial Decision adequately addresses that issue, and I see no reason to reiterate it again.

Accordingly, the Respondents' Petition for Reconsideration and Further Petition for Reconsideration are DENIED.

/s/ Jennifer Gee
JENNIFER GEE,
Administrative Law Judge

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ISSUE DATE: 26 February 2004

CASE NO.: 2002-LHC-02122
OWCP NO.: 07-105398

In the Matter of:

CHRISTOPHER HEAVIN,
Claimant,
vs.
CHEVRON, U.S.A., INC.,
Employer,
and
CRAWFORD & COMPANY,
Carrier

Appearances: Eric A. Dupree, Esquire,
For the Claimant

James P. Aleccia, Esquire
For the Employer/Carrier

Pamela W. McKee, Esquire
For the Party in Interest

Before: Jennifer Gee
Administrative Law Judge

ORDER GRANTING REQUEST FOR MODIFICATION OF DECISION

This matter involves a claim for disability benefits filed by the Claimant, Christopher Heavin, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. ("the Act"). At the hearing on March 11, 2003, in San Diego, California, the Claimant sought a determination of permanent total disability arising from industrial injuries he suffered on October 13, 1986, when he fell 40 feet from an offshore drilling platform while working for Chevron USA.

I issued a Decision and Order Granting Permanent Total Disability Benefits on December 11, 2003, finding that the Claimant reached maximum medical improvement on July 6, 1988, and awarding him permanent total disability benefits. I also specifically found that the Claimant was totally disabled from March 13, 1998 to March 15, 1999, while he underwent Interferon treatment. The Claimant has filed a Motion for Reconsideration asking for clarification and additional findings. The Claimant seeks the following:

1. A finding that the Claimant is entitled to temporary total disability benefits from the date of the injury through July 5, 1988;

2. Clarification concerning the Claimant's entitlement to permanent total disability benefits from March 13, 1998 through March 15, 1999, when he was receiving his Interferon treatment;

3. A finding that the Claimant is entitled to reimbursement for the cost of medical testing performed by Dr. Thomas J. Wegman;

4. A finding that the Claimant is entitled to penalties and interest.

The Claimant's Entitlement to Temporary Total Disability Benefits from the Date of the Injury through July 5, 1988

The Claimant asks for a finding that he is entitled to temporary total disability benefits from the date of his injury through July 5, 1988, the day before he reached maximum medical improvement. The Respondents do not dispute the Claimant's entitlement to temporary total disability benefits before he reached maximum medical improvement but object to the temporary total disability benefits beginning with the date of injury.

I agree with Respondents that the Claimant's temporary total disability benefits should run from the day after his injury, which is October 14, 1986. Accordingly, this modification is GRANTED as modified.

The Claimant's Entitlement to Permanent Total Disability Benefits from March 13, 1998 through March 15, 1999

In my Decision, I awarded the Claimant permanent total disability benefits beginning July 6, 1988, the day after he reached maximum medical improvement. I also separately found that he was totally disabled from March 13, 1998 through March 15, 1999, while he was receiving Interferon treatment. This latter finding was at the request of the Claimant.

Pursuant to this finding, I ordered the Respondents to pay the Claimant total disability benefits, as opposed to permanent total disability benefits, during that time period. Respondents

argue that he should receive temporary total disability benefits while he was receiving Interferon treatment.

The award of temporary and permanent total disability benefits for the period when the Claimant was receiving Interferon treatment are in conflict and warrants clarification. My finding that the Claimant was totally disabled while receiving Interferon treatment was an alternative basis for his total disability for that time period. I did find that the Claimant reached maximum medical improvement on July 5, 1988, and should be awarded permanent total disability benefits beginning July 6, 1988. I did not intend to award the Claimant temporary total disability benefits in lieu of the permanent total disability benefits he would otherwise be entitled to while he was undergoing Interferon therapy. My Order to the contrary was in error.

Accordingly, this request for modification is GRANTED. The Claimant is entitled to permanent total disability benefits beginning July 6, 1988, including the period from March 13, 1998 through March 15, 1999.

The Claimant's Entitlement to Reimbursement for the Cost of Medical Testing Performed by Dr. Thomas J. Wegman

The Claimant asks for a finding that he is entitled to be reimbursed by the Respondents for the six-day neuropsychological evaluation performed by Dr. Thomas J. Wegman. The Claimant's employer is liable for any medical expenses that were the natural and unavoidable result of his work injury. Atlantic Marine v. Bruce, 661 F.2d 898 (5th Cir. 1981). The Respondents do not contend that the Claimant's

need for the psychological testing stemmed from anything other than his October 13, 1986 accident.

It is understood that an employee cannot receive reimbursement for medical expenses unless he has first requested authorization prior to obtaining treatment. 20 C.F.R. §§ 702.421; *Lane v. Bell Helicopter Co.*, 36 BRBS 111 (1999); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curiam), rev'g 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Brothers Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding*, 15 BRBS 299 (1983). Here, as required, the Claimant and his attorneys attempted to obtain authorization for Dr. Wegman's testing, but were repeatedly unsuccessful. (CX 16, p. 300-01, 313, 315, 325, 351-52.) After waiting five years after the first request for authorization, the Claimant proceeded with the testing on his own and incurred costs of $7,050.00. The Claimant has now paid the $7,050.00 invoice in full and is entitled to reimbursement for the full amount, as the testing was related to his October 13, 1986 injury.

Although the Respondents contend that they should not be held liable for the $7,050.00 invoice because it was not included as a trial exhibit and was not submitted as part of the Claimant's Pre-Trial Statement, they are liable for the full amount. The Claimant did include Dr. Wegman's first invoice in his Exhibits (CX 17, p. 449-50), but admits that he failed to include Dr. Wegman's second invoice for the remaining balance due. Regardless, the Respondents should have authorized the Claimant's neuropsychological evaluation by Dr. Wegman. Because they failed to authorize the evaluation, the Respondents must now reimburse the Claimant for the

$7,050.00 he paid.[1]

The Claimant's Entitlement to Interest and Penalties

Interest on Dr. Wegman's Invoice for $7,050.00

The Ninth Circuit has held that interest may be assessed against an employer on overdue medical expenses, whether reimbursement is owed to the provider or to the employee. *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993), rev'g *Bjazevich v. Marine Terminals Corp.*, 25 BRBS 240 (1991). The Court explained: "The remedial purposes of the [Longshore] Act would be undermined if employers were allowed to withhold medical payment.....interest free." *Hunt*, 999 F.2d at 422. The Court further justified its position by pointing out "[t]he financial burden that medical costs impose on an injured employee is just as debilitating as the loss of income resulting from the employee's inability to work." Id. (quoting *Lazarus v. Chevron USA, Inc.* 958 F.2d 1297, 1302 (5th Cir. 1992)).

In this case, the Respondents failed to authorize the evaluation by Dr. Wegman and failed to reimburse the Claimant for the cost of the evaluation, thereby causing expenses paid by the Claimant for the evaluation, to become overdue. Therefore, the Respondents must not only reimburse the Claimant for the $7,050.00 he paid for the evaluation, but must also pay interest on that amount in accordance with 28 U.S.C. § 1961. *See Lane v. Bell Helicopter Co.*, 36 BRBS 111 (1999); *see also Yarbrough v. St. Bernard Well Service*

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[1] Dr. Wegman's second invoice was later added to the Claimant's trial Exhibits and now appears as CX 17, p. 450A.

Inc., 31 BRBS 243 (1997); *see also* 33 U.S.C. § 907. Interest should be computed from the date the Claimant made each payment[2] until the date the Claimant receives reimbursement from the Respondent. *See Eliason v. Nichols Bros. Boat Builders*, 34 BRBS 524 (2000).

Although the Claimant has also asked to be awarded penalties for the Respondents' failure to either authorize the evaluation or reimburse the Claimant, that request is denied as there is no authority allowing for penalties in such a situation.

Penalties for Underpaid Benefits up to the Date of the Notice of Controversion

Section 14(e) of the Act provides:

> (e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment. 2 The Claimant apparently paid Dr. Wegman's bill in two payments. Interest should run from the date of each payment.

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[2] The Claimant apparently paid Dr. Wegman's bills in two payments. Interest should run from the date of each payment.

33 U.S.C. § 914(e). In order to escape a penalty under Section 14(e), an employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981).

When a dispute arises over the amount of compensation due, even if some compensation has been voluntarily paid, the employer is required to file a notice of controversion if it chooses not to pay the compensation sought. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). If a claimant disputes the amount of benefits paid since the date of the injury and the employer fails to file a notice of controversion within 14 days of becoming aware of the dispute, a Section 14(e) penalty will be assessed on the disputed amount, dating back to the date of the injury. *Browder v. Dillingham Ship Repair*, 25 BRBS 88, 90 (1991). The employer's liability for the Section 14(e) penalty terminates with its filing of a notice of controversion. *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989).

In this case, the record indicates that the Respondents were notified of a dispute regarding the Claimant's average weekly wage on various occasions. First, in a letter to the U.S. Department of Labor, dated March 21, 1997, to which Crawford & Company was cc'ed, the Claimant's counsel listed the "Amount of Benefits" as one of the issues to be addressed at the Informal Hearing scheduled for March 24, 1997. (CX 14, p. 244-49.) Next, at the March 24, 1997 Informal Conference, the issue of the Claimant's average weekly wage was addressed. In a letter memorializing the Informal Conference, the Claims Examiner advised the

Insurance Carrier to provide all parties with a copy of the Claimant's wage records for the year prior to the date of injury, so that a determination could be made regarding the Claimant's average weekly wage. (CX 14, p. 261.) Finally, in both notices announcing the June 17, 1999 and July 13, 1999 Informal Conferences, the Office of Workers' Compensation Programs ("OWCP") listed the issues to be resolved and included "Average weekly wage/compensation rate." (CX 14, p. 240- 43.) Therefore, the Respondents had notice that there was a dispute regarding the Claimant's average weekly wage.

In order to escape Section 14(e) liability, an employer has to file a notice of controversion within 14 days of becoming aware of a dispute. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *see also DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981). If the employer fails to do so, a Section 14(e) penalty will be assessed on the disputed amount, dating back to the date of the injury. *Browder*, 25 BRBS at 91. Here, although the Respondents did file a notice of controversion, they failed to do so within 14 days of receiving notice of the average weekly wage dispute. The Respondents filed the notice of controversion on July 29, 1999 (CX 14, p. 227), more than two years after the Claimant's March 24, 1997 Informal Hearing, 58 days after notice of the June 17, 1999 Informal Conference was mailed by the OWCP on June 1, 1999, and 34 days after notice of the July 13, 1999 Informal Conference was mailed by the OWCP on June 25, 1999.[3] Because the

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[3] Although there is no Exhibit indicating the date the Respondents received the Notices of the Informal Conferences, it is assumed that the notices were delivered within seven days. (The Claimant's counsel received the first Notice on June 3, 1999, two days after it was mailed and the second Notice on June 28, 1999, three days after it was mailed.)

Respondents received notice of the average weekly wage issue on various occasions and still failed to timely file a notice of controversion, the Claimant is entitled to a Section 14(e) penalty for the difference between the amount the Respondents voluntarily paid the Claimant and the amount determined to be due.

An employer's Section 14(e) liability ceases on the date of the filing of the notice of controversion or on the date of the informal conference, whichever comes first. *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875, 880, 11 BRBS 68, 71 (9th Cir. 1979), aff'g in part and rev'g in part *Holston v. National Steel & Shipbuilding Co.*, 5 BRBS 794 (1977). After the average weekly wage issue arose in this case, the Informal Conference took place on March 24, 1997, more than two years before the Employer filed its notice of controversion on July 29, 1999. Therefore, because the March 24, 1997 Informal Conference preceded the Employer's July 29, 1999 notice of controversion, the Respondents are liable for a Section 14(e) penalty only until March 24, 1997. In sum, the Respondents shall pay a Section 14(e) penalty, assessed from October 14, 1986, the day after the Claimant's injury, until March 24, 1997, the date of the Informal Conference. *See id.*; *see also Browder*, 25 BRBS at 90-91.

ORDER

The Claimant's Motion for Reconsideration is GRANTED. The Order in my December 11, 2003 Decision and Order Granting Permanent Total Disability Benefits is hereby MODIFIED to read as follows:

1. The Employer, Chevron USA, Inc. and Crawford & Company, its carrier, shall make payments to the Claimant, for temporary total disability benefits from October 14, 1986 through July 5, 1988, based on an average weekly wage of $1,009.63 per week.

2. Chevron USA, Inc. and Crawford & Company shall make payments to the Claimant, for permanent total disability benefits beginning July 6, 1988, based on an average weekly wage of $1,009.63 per week.

3. Chevron USA, Inc. and Crawford & Company shall receive credit for temporary total disability payments made to the Claimant until January 6, 1996, and for temporary partial disability payments made to the Claimant since January 6, 1996.

4. Chevron USA, Inc. and Crawford & Company shall reimburse the Claimant in the amount of $1,976.29, for the prescribed Interferon that he purchased on his credit card.

5. Chevron USA, Inc. and Crawford & Company shall pay interest on each past due unpaid compensation payment from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. §§ 1961 and 33 U.S.C. §§ 914(e).

6. Chevron USA, Inc. and Crawford & Company shall reimburse the Claimant in the amount of $7,050.00 for the cost of medical testing performed by Dr. Thomas Wegman.

7. Chevron USA, Inc. and Crawford & Company

shall pay interest on the $7,050.00 owed to the Claimant from the date the Claimant made each payment of that bill until the date of reimbursement at the rates prescribed under the provisions of 28 U.S.C. §§ 1961 and 33 U.S.C. §§ 914(e).

8. Chevron USA, Inc. and Crawford & Company shall pay Section 14(e) penalties for the difference between the amount the Respondents voluntarily paid the Claimant and the amount determined to be due assessed from October 14, 1986 until March 24, 1997, the date of the Informal Conference.

9. The District Director shall make all calculations necessary to carry out this Order.

10. Chevron USA, Inc. and Crawford & Company shall authorize all requested medical evaluations and/or treatments relating to any of the Claimant's medical conditions referenced in this decision.

11. Chevron USA, Inc. and Crawford & Company shall authorize the Claimant's treatment for his psychological/psychiatric deficiencies, including his ongoing depressive disorder.

12. Chevron USA, Inc. and Crawford & Company shall provide compensation to University of California San Diego Medical Center for the 11 Interferon treatments it provided to the Claimant, should the Medical Center seek payment.

13. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel

within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the Respondent's Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for employer shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

/s/ Jennifer Gee

JENNIFER GEE
Administrative Law Judge

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ISSUE DATE: 11 December 2003

CASE NO.: 2002-LHC-2122
OWCP NO.: 07-105398

In the Matter of:

CHRISTOPHER HEAVIN,
Claimant,
vs.
CHEVRON USA, INC.,
Employer,
and
CRAWFORD & COMPANY,
Carrier.

APPEARANCES:

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For the Employer/Carrier

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER GRANTING PERMANENT TOTAL DISABILITY BENEFITS

INTRODUCTION

This matter involves a claim for disability benefits filed by the Claimant, Christopher Heavin, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. ("the Act"), for a determination of permanent total disability arising from industrial injuries suffered on October 13, 1986, when Claimant fell 40 feet from an offshore drilling platform while working for Chevron USA. (HT, p. 97-98; CX 2, p. 107.) The Claimant seeks an order setting forth the Employer's responsibilities respecting his medical care, and establishing the industrial basis of his injuries and conditions, and the Employer's responsibility to provide medical screening and treatment. This proceeding was initiated under the Act on June 13, 2002, when it was referred to the Office of Administrative Law Judges for formal hearing.

For the reasons set forth below, the Claimant is granted permanent total disability benefits.

PROCEDURAL BACKGROUND

This matter was heard in San Diego, California, on March 11, 2003. The Claimant, his counsel, Eric A. Dupree, and the Employer's and Carrier's counsel, James P. Aleccia, all appeared and participated in the trial.

At the trial, the Claimant's Exhibits ("CX") 1-14, 15 (except for page 263A), 16 (pages 354-58 only) and 17-23 were admitted. The Employer's exhibits ("EX") 1-11, 13-20,

and 22-23 were also admitted. The Employer's Exhibit 12 was withdrawn. In post-trial rulings, the Claimant's Exhibit 24 and the Employer's Exhibits 24-28 were admitted. However, the Employer's Exhibit 21 was excluded.

The Claimant was receiving temporary total disability benefits from the Employer until January 6, 1996, when the Employer, after reviewing a Labor Market Analysis conducted by Crawford & Company, shifted the Claimant to temporary partial disability status. The Claimant filed a workers' compensation claim with the Office of Workers' Compensation Programs on June 4, 2002, and on June 13, 2002, the District Director referred the matter to the U.S. Department of Labor, Office of Administrative Law Judges, for a formal hearing.

ANALYSIS AND DISCUSSION

Issues:

The following issues are pending in this case:

1. When did the Claimant reach maximum medical improvement (MMI)?
2. What is the nature and extent of the Claimant's disability?
3. What was the Claimant's average weekly wage?
4. Is the Employer entitled to § 8(f) relief?
5. Is the Claimant entitled to reimbursement for the Interferon treatment he received?

Factual Background

The Claimant, who was born in 1953, began working in the oil industry in June 1976, on the day he graduated from

college.[1] (HT[2] p. 79-80.) His first job was with Pittsburg and Midway Coal Mining Company, a subsidiary of Gulf Oil. (HT p. 85.) He worked at Pittsburg and Midway until November 1981, and during that time worked his way up from sample carrier to production operator. (HT, p. 85.)

The Claimant next worked as an environmental and safety engineer with the Exploration and Production Company, another subsidiary of Gulf Oil, where he remained until January 1984 (HT, p. 88.) In 1984, the Claimant was transferred offshore to continue his duties as an environmental and safety engineer and also to work as a production person. (HT, p. 89.) He reached the highest level of production manager, a position referred to as "pumper gauger" in Chevron terminology, and then was promoted to the position of lease operator, referred to as "facility operator" in Chevron terminology, shortly after Gulf Oil merged with Chevron. (HT, p. 90-91.) It was in this position of facility operator that the Claimant was injured on October 13, 1986 (HT, p. 5), when he fell approximately 40 feet from an offshore drilling platform (HT. p. 97; CX 2, p. 107) and suffered a bruised heart, fractured ribs, fractured back (HT, p. 19; CX 11, p. 218; EX 19, p. 956), fractured hip (HT, p. 6), fractured right femur, ruptured spleen, (HT, p. 19; CX 11, p. 218), punctured lungs, punctured diaphragm, injured liver (HT, p. 101; EX 19, p. 956), and laceration of his only kidney. (HT, p. 101; CX 11, p. 218; EX 19, p. 956.)

Once the Claimant had stabilized at the hospital, specialists were called to perform multiple surgeries. Dr.

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[1] Mr. Heavin testified that he went to work the day of his college commencement to "make money rather than stand in line in a gown and robe..."

[2] References to "HT" are to the trial transcript

Robert Carter repaired the hole in the Claimant's diaphragm and inserted a chest tube. (EX 19, p. 956.) Dr. Andrew King reconstructed the Claimant's fractured back by wiring a Harrington rod to his spinal column. (CX 12, p. 221-22; EX 19, p. 954-55.) Dr. William M. Pusateri repaired the Claimant's fractured leg with a metal plate fixation. (CX 13, p. 223.) Dr. E.H. Goodier treated the Claimant's kidney problems. (EX 19, p. 956.)

The Claimant received approximately 48 blood transfusions as a result of blood lost from internal bleeding (CX 14, p. 229) and was treated with hemodialysis in order to restore his left kidney's function. The Claimant's right kidney had been removed prior to the date of the injury, as a result of a congenital deformity. (EX 18, p. 735; EX 8, p. 208; EX 17, p. 735.) The Claimant also received regular psychological counseling in the hospital because of his resistance to the dialysis procedure. (CX 14, p. 229.)

After the Claimant recovered in the hospital from October 13, 1986 to December 29, 1986 (EX 19, p. 961), he returned to his home in Lafayette, Louisiana, where he was treated by various doctors for his multiple injuries. (HT, p. 103.) One of the Claimant's treating doctors, Dr. Louis C. Blanda, monitored the fusion in the Claimant's back. After examining the Claimant on February 19, 1987, Dr. Blanda commented on the Claimant's future employability that "light duty work would be his major goal. (CX 10, p. 216.)

In January 1988, the Claimant moved to San Diego, California, near his sister, after learning that he could obtain better medical attention there. (HT, p. 104.) When the Claimant's pain persisted, he asked nurses from Tri-Cities Medical Center to suggest a back doctor for him. (HT, p. 106.) They strongly recommended Dr. Raymond J. Linovitz, a spine specialist. (HT, p. 106.) Thereafter, Crawford &

Company, Chevron's Insurance Carrier, approved Dr. Linovitz as the Claimant's treating specialist (HT, p. 107) and sent Dr. Linovitz a referral notification. (CX 24, p. 6.)

On July 6, 1988, the Claimant was first evaluated by Dr. Linovitz. (CX 2, p. 97.) On the first visit, Dr. Linovitz examined the Claimant and found him to be asymptomatic. However, the Claimant returned to Dr. Linovitz approximately ten days later, after doing some volunteer work, with an onset of pain. (CX 2, p. 94.) The Claimant described the pain in his back as radiating down into his rectum, and down his right leg toward the foot, causing his right leg to feel weak and to cramp. (CX 2, p. 75, 94.) Dr. Linovitz scheduled an emergency myelogram, which showed a complete block at L1-2 and narrowing disc space. (CX 2, p. 92.) Dr. Linovitz then immediately scheduled surgery to correct the problem.

On July 29, 1988, Dr. Linovitz conducted a preoperative evaluation of the Claimant and scheduled surgery for the following week to remove the Claimant's Harrington/Luque instrumentation and explore his L1-2 region. However, prior to the August 1, 1988 surgery date, the Claimant's liver function tests showed severely elevated liver enzymes and the surgery was postponed until August 9, 1988. (EX 19, p. 921, 1005.)

On August 9, 1988, Dr. Linovitz performed the surgery on the Claimant, removing the Harrington-Luque instrumentation from his back and inserting a cerebrospinal fluid shunt. (CX 2, v. 1, p. 100.) Dr. Linovitz also repaired the Claimant's pseudoarthrosis.[3] (CX 2, v. 1, p. 100.) Dr. Linovitz explained to the Claimant that he found that the

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[3] Although Dr. Linovitz's report used the spelling "pseudoarthrosis" in this instance, rather than "pseudarthrosis" as in his earlier report, he refers to the same condition.

screws and bailing wire in the Claimant's back had slipped so that the wire was cutting into the Claimant's spinal column and causing him pain. (HT, p. 111.) More precisely, one of the sublaminar wires placed during the original surgery had caused erosion of the covering of the spinal cord, causing a hole in the dura and chronic scarring down to the bony canal. (CX 24, p. 8.) Dr. Linovitz's post-operative diagnosis explained that the Claimant suffered from arachnoiditis at L1-2. (CX 2, p. 100.)

Arachnoiditis is chronic inflammation and thickening of the middle layer of the three meninges (membranes that cover and protect the spinal cord). (CX 24, p. 12.) The middle layer, referred to as the arachnoid, is a thin vascular layer that, with trauma or as a result of a procedure such as a myelography,[4] becomes inflamed and scarred. (CX 24, p.12 .) The nerve roots in the arachnoid area become clumped in a way that nothing can flow through. (CX 24, p. 12.) Currently, there is no effective treatment for arachnoiditis. (CX 24, p. 12.)

Aside from the Claimant's arachnoiditis, X-rays taken of the Claimant on September 30, 1988, showed persistent right thoracolumbar scoliosis of 15 degrees. (CX 2, p.77.) Two months later, on November 28, 1988, another set of X-rays showed persistence of the post-traumatic scoliosis. (CX 2, p.77.) On February 2, 1989, X-rays showed the post-traumatic scoliosis had increased from 17 to 22 degrees. (CX 2, p. 78.) From these findings, Dr. Linovitz concluded on June 1, 1989, that since the Claimant's 1988 surgery, he had developed a progressive spinal deformity at the L1-2 area with scoliosis and lateral listhesis. (EX 19, p. 994.)

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[4] A myelography is an injection of radionaque dye into the spinal canal followed by X-rays

On February 24, 1989, Dr. Linovitz issued a medical report clarification wherein he explained that his opinion regarding the Claimant's employability had changed due to the Claimant's worsening condition. Dr. Linovitz explained that on July 6, 1988, he first believed that the Claimant was employable in a "very sedentary type of position." (CX 2, p. 70.) However, after the Claimant returned on July 22, 1988, with severe cauda equine syndrome and progressive neurologic deficit, Dr. Linovitz found the Claimant to be totally unemployable. (CX 2, p. 70.) After Dr. Linovitz performed surgery on the Claimant and a follow-up appointment on February 2, 1989, he found that the Claimant was "perhaps capable of only very sedentary employment." (CX 2, p. 72.)

On March 30, 1989, Dr. Linovitz explained in a medical report that the Claimant suffers from continuing difficulty due to arachnoiditis and probable pseudoarthrosis. (CX 2, p. 68.) Further, in Dr. Linovitz's deposition, he explained that the second fusion performed in the 1988 surgery hadn't healed correctly and that another surgery would likely be necessary in the future. (CX 24, p. 9) On April 21, 1989, the Claimant described discomfort in his right leg and numbness in his left leg, which led Dr. Linovitz to conclude he was suffering from significant pseudarthrosis and progressive instability. Dr. Linovitz found that surgery was necessary in order to increase the Claimant's chances of fusion and correction of the deformity. (CX 2, p. 66.) On May 8, 1989, Dr. Linovitz reported that the Claimant had a significant block at the L1-2 level, due to arachnoiditis and/or his deformity. (CX 2, p. 67.)

The Claimant's next surgery took place on June 1, 1989, after Dr. Linovitz determined that the Claimant's scoliosis had increased to 32 degrees (EX 19, p. 996) and that

the Claimant had developed an established pseudoarthrosis at L1-2 with progressive lateral listhesis. (CX 2, p. 58.) Dr. Linovitz performed a two-stage operation wherein he first cut through the Claimant's chest to do a bony fusion in the front of his spine and next cut through the Claimant's back, where he stabilized the spine with metal and placed bone graft. (CX 24, p. 9.) The surgery consisted of anterior diskectomies, anterior fusion, harvesting of crest bone grafts, pedicle screw instrumentation and fusion (CX 2, v. 1, p. 58; HT, p. 417), and removal of the plate in the Claimant's right leg. (CX 2, p. 55.)

On July 14, 1989, Dr. Linovitz examined the Claimant and found his recovery to be in order. (CX 2, p. 51.) X-rays taken during the doctor's visit revealed that the Claimant's scoliosis curve was reduced from 32 degrees to 22 degrees. (CX 2, p. 51.)

On August 25, 1989, X-rays showed that the surgery was successful and that the Claimant was maintaining the alignment and fixation as well as consolidating his bone graft. (CX 2, p. 49.)

On October 6, 1989, Dr. Linovitz reported that the Claimant's scoliosis curve remained at 19 degrees (the same as it was on his August 29, 1989 doctor's visit) but that the Claimant's fusion was not solid. (CX 2, p. 48.) The Claimant complained of a pinching sensation in his left thigh. (EX 2, p. 48.)

On November 17, 1989, X-rays showed that the Claimant's scoliosis curve had decreased to 17 degrees, but that his fusion still was not solid. (CX 2, p. 48.) In addition, the Claimant still complained of a pinching sensation in his left thigh. (CX 2, p. 48.)

On January 5, 1990, X-rays showed the Claimant's scoliosis to be stable at 20 degrees and his fusion to be solidifying, but not solid. (CX 2, p. 47.)

On April 6, 1990, Dr. Linovitz reported that the Claimant's rods were holding well and that there was no loss in fixation and no increase in deformity. (CX 2, p. 47.) However, Dr. Daniel M. Pertschuk, who was also monitoring the Claimant, stated that the Claimant suffered from a metabolic bone disease that was hindering the solidifying process of the fusion. (CX 2, p. 46-47.)

On July 10, 1990, X-rays of the Claimant showed no increase in his deformity. In addition, the Claimant's fusion finally appeared to be solid and the fixation intact. (CX 2, p. 43.)

On January 11, 1991, the Claimant complained to Dr. Linovitz of minimal back pain and continued numbness in his left leg. (CX 2, p. 42.)

On March 2, 1992, the Claimant was evaluated by Dr. Clyde Beck, a nephrologist, who noted that the Claimant had a small left inguinal hernia in addition to the traumatic damage to his left kidney. (CX 14, p. 252.)

On January 27, 1993, although the Claimant complained of back discomfort, X-rays showed his fixation to be solid, his fusions to be healed and his scoliosis to be stable at 19 degrees. (CX 2, p. 39.)

On February 2, 1993, the Claimant was evaluated by Dr. Carlos A. Perosio, a psychiatrist. Dr. Perosio found the Claimant's retention and recall, as well as his reading ability, to be impaired (CX 8, p. 211.) He also found the Claimant to have severe learning disabilities and difficulties with mathematics, concentration, and repetitive tasks. (CX 8, p.

210-11.) Specifically, Dr. Perosio found that the Claimant could not keep pace, persist or complete a task. (CX 8, p. 211.)

On February 4, 1994, the Social Security Administration issued a decision awarding the Claimant disability insurance benefits under sections 216(i) and 223 of the Social Security Act. (CX 1, p. 1-7.) The ALJ noted that the Ninth Circuit Court of Appeals had already found the Claimant to be disabled from October 13, 1986 through October 13, 1987, but that the Social Security Administration decision determined the Claimant to be "disabled from October 14, 1987 through the present." (CX 1, p. 7.) In rendering the decision, the ALJ took into consideration multiple factors including that the Claimant had "severe multiple traumatic injuries necessitating surgery, an organic mental disorder, [and] an affective disorder." (CX 1, p. 6.)

In addition, the ALJ considered the following testing results from various specialists: the psychological testing results of Sara Arroyo, PhD, who found the Claimant unable to sit and concentrate for more than an hour (CX 1, p. 4.); the consultative examination results of Dr. Perosio, a psychiatrist, who found that the Claimant had no ability to maintain attention and concentration due to severe learning disabilities (CX 1, p. 4.); and the consultative examination results of Dr. Stanley Terman, a psychiatrist, who diagnosed a dysthymic disorder that would prevent the Claimant from handling even a low stress job. (CX 1, p. 4; CX 7, p. 206.) The ALJ further considered the expert medical testimony of Timothy McManus, PhD, who found the Claimant to suffer from dysthymia, as well as an organic mental disorder with memory impairment and perceptual and thinking disturbances. (CX 1, p. 4.)

After reviewing the above-mentioned opinions, the ALJ found that "the claimant's mental condition has precluded his ability to perform even simple and repetitive task-type employment on a sustained basis since the onset date through the present." (CX 1, p. 6.) The ALJ further stated that even though the Claimant's physical condition improved in February 1989, that "nonetheless, the claimant's severe and disabling mental impairments render the claimant unable to perform any substantial gainful activity on a sustained basis (20 CFR 404.1572)." (CX 1, p. 6.) Further, the ALJ stated that "Considering his maximum sustained work capability, age, education, and work experience, there are no other jobs the claimant is capable of performing which exist in significant numbers in the national economy." (CX 1, p. 6.)

On June 8, 1995, pursuant to a request by Crawford & Company, Dr. Linovitz conducted an examination of the Claimant. Dr. Linovitz reported that the Claimant continued to have difficulty with low back pain, pins and needles sensations in his anal region, numbing of his left, lower leg, abnormal sexual function and impaired renal function. (CX 2, p. 35.) X-rays taken during the visit showed the Claimant's residual scoliosis to persist. (CX 2, p. 36.) Dr. Linovitz also explained that the Claimant had "constant moderate discomfort in his back and lower extremities with worsening intermittent discomfort and dysesthesias[5] involving his anal region and leg." (CX 2, p. 36.) (emphasis added)

In response to a June 5, 1995 request by Crawford & Company for Dr. Linovitz to report whether the Claimant was considered permanent and stationary at the time of the scheduled June 8, 1995 examination, Dr. Linovitz replied that the Claimant was indeed considered permanent and stationary.

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[5] Dysesthesias refers to the impairment of sensitivity

(CX 2, p. 36.) Dr. Linovitz further stated on June 8, 1995, that "Mr. Heavin has disability resulting in limitation to sedentary work. It contemplates he can do work predominantly in a sitting position at a bench, desk or table with a minimum demand for physical effort and with some degree of walking and standing being permitted." Although he stated that the Claimant was capable of working, Dr. Linovitz explained to Ann Mueller, an RN from Crawford & Company, who accompanied the Claimant to the appointment, that he could not think of a job that would be suitable for the Claimant. (HT, p. 115.)

On February 13, 1997, the worsening intermittent discomfort and dysesthesias involving the Claimant's anal region and leg (mentioned above during the June 8, 1995, visit), indeed worsened. The Claimant complained that his back pain was worse and that he suffered tingling and burning sensations down his left leg. (HT, p. 116.) According to Dr. Linovitz's report:

> Apparently since [the June 8, 1995] evaluation, at which time I said he could do only sedentary employment, he has worsened. His sitting tolerance without back and/or left leg symptoms, is no more than 15 or 20 minutes, at which point he must get up and walk around or lie down. Almost all activities such as bending, stooping and lifting exacerbate his back and his left leg symptomatology. He still has difficulty with his bowels and has bowel urgency and sometimes will soil himself if he doesn't get to the bathroom very quickly.

(CX 2, p. 32.) Dr. Linovitz noted that the Claimant's bowel urgency resulted from partially resolved cauda equine

syndrome. (CX 2, p. 33.) After reviewing the Claimant's condition during the February 13, 1997 appointment, Dr. Linovitz concluded that the Claimant was unable to participate even in sedentary work. (CX 2, p. 33.) He further noted his concern that if the Claimant's pain continued to increase, he could require spinal cord stimulation or use of an epidural or Morphine pump. (CX 2, p. 33.) At this same appointment, Dr. Linovitz referred the Claimant to Dr. Dominick Addario, a psychiatrist, for a psychiatric/psychological evaluation. (CX 2, p. 33.)

On April 15, 1997, Dr. Addario began the first of a three-day comprehensive neuropsychiatric evaluation of the Claimant. (HT, p. 232.) Dr. Addario found that, as a result of the October 13, 1986 injury, the Claimant suffered a mild traumatic brain injury associated with deficiencies in mathematical function, reasoning, deductive ability and short-term memory, as well as impairments in resiliency, increased irritability, and aggravation and magnification of obsessive-compulsive and avoidant behaviors. (CX 20, p. 542.) In his report dated June 25, 1997, which summarized the three-day testing, Dr. Addario noted that the Claimant suffered from pre-existing, nonindustrial, dyslexia affecting his verbal functioning. (CX 20, p. 543.) In fact, Dr. Addario found that the Claimant, with all of his conditions combined, was most likely totally disabled. (HT, p. 214.)

In 1997, the Claimant was seen by Dr. Robert W. Steiner, who took a blood test and found that the Claimant's liver problem was persisting. (HT, p. 131.) Dr. Steiner referred the Claimant to Dr. Tarek I. Hassanein who performed a liver biopsy and found the Claimant's liver to be degraded (HT, p. 132) and inflamed with hepatic activity, thereby indicating that the Claimant was positive for the Hepatitis C virus. (CX 5, p. 196.) Shortly after receiving the results from the liver biopsy, Dr. Hassanein prescribed

Interferon for treatment. (HT, p. 138.) When the Claimant had his prescription filled, the authorization from Crawford & Company failed to go through, so the Claimant paid for the prescription, in the amount of $1,976.29, on his credit card. (HT, p. 141-43; CX 16, p. 355.) When the authorization for the Interferon never came through, the nurses at University of California San Diego Medical Center continued to provide Interferon to the Claimant at no cost, by using Interferon that had been returned to the Medical Center by patients who could not tolerate the effects of the drug. (HT, p. 143.)

On May 29, 1998, Dr. Steiner issued a medical report stating that the use of Interferon causes a flu-like condition. (CX 3, p. 122.) Dr. Steiner further explained that, due to the Claimant's Hepatitis C, at some point he will lose stamina and will not be able to work up to normal capacity. (CX 3, p. 122.) He explained that "a typical course of hepatitis C liver disease is progressive liver failure, leading to total disability." (CX 3, p. 122.) In other words, Hepatitis C is a full progressive disease that frequently gives rise to liver failure and the need for liver transplantation. (CX 19, p. 518F.)

On August 19, 1998, at the request of the Employer's counsel, James Aleccia, the Claimant was evaluated by Dr. Jerome H. Franklin, a psychiatrist. Dr. Franklin found that although the Claimant demonstrated a history of mild cognitive dysfunction, that if he were motivated, he could be gainfully employed at some sedentary position. (EX 9, p. 267.) Dr. Franklin stated that the Claimant did not have a diagnosis of clinical anxiety or depression, but then suggested a trial of antidepressant medication such as Prozac or Zoloft to give him a greater sense of control over his emotions. (EX 9, p. 267-68.)

On August 24, 1998, the Claimant was examined by Dr. James T. London, an orthopedic surgeon. The Claimant

reported that he had constant, sharp, stabbing pains in his lower spine and that he felt a stabbing sensation in that area whenever soft tissue moved over the rods. (EX 7, p. 169.) In addition to other complaints listed in the medical report, Dr. London reported that the Claimant suffered constant numbness in his entire left lower extremity, radiating distally into all five toes of his left foot, constant pins and needles sensation in the groin area, and a feeling of urgency before making a bowel movement. (EX 7, p. 170.) Dr. London testified that he saw no reason to doubt the Claimant's credibility (EX 24, p. 35) and therefore considered his pain complaints credible. (EX 24, p. 37.)

On September 8, 1998, again at the request of James Aleccia, the Claimant was evaluated by Charles Furst, a neuropsychologist. The Claimant's symptoms included memory dysfunction and every day memory lapses including misplacing possessions and forgetting phone numbers. Dr. Furst gave the Claimant a series of tests and reported problematic results in the following testing areas: 1) Complex attention and freedom from distractibility 2) rapid mental processing speed 3) memory dysfunction and 4) mathematical abilities. (EX 10, p. 307.) Dr. Furst concluded that the Claimant suffered from a slight additional disability on the basis of his head residuals, however, he concluded that the Claimant's neurocognitive defects would still not prevent him from performing in the competitive job market. (EX 10, p. 309.)

On October 7, 1998, the Claimant was evaluated by Dr. Paul J. Grodan, an internist and cardiologist, who stated "There is no question Mr. Heavin has a renal impairment." He attributed the Claimant's renal impairment partially to his pre-

existing right nephrectomy[6] and partially to his October 13, 1986 injury which caused him also to have part of his left kidney removed. (EX 8, p. 208.) However, Dr. Grodan explained that even though the Claimant has an elevated creatinine level of 2.9, and is operating on a small residual kidney, this renal impairment does not limit the Claimant from employment, as his orthopedic injuries do. (EX 8, p. 208-09; CX 19, p. 518B; EX 25, p. 31.)

On July 13, 1999, the Claimant met with Chevron USA, Inc. and Crawford & Company for an informal conference before Linda Myer, a Claims Examiner for the Office of Workers' Compensation Programs of the U.S. Department of Labor. The Claims Examiner issued a recommended opinion that stated the Claimant's Average Weekly Wage ("AWW") should be $864.99 as claimed, thereby producing a compensation rate of $576.94 per week. (CX 14, p. 231.) The opinion further recommended that the Claimant be authorized to seek psychological treatment for his ongoing depressive disorder and that he be provided authorization for all requested medical evaluations and reimbursement for out of pocket expenses. (CX 14, p. 231.)

On July 29, 1999, when the Claimant was examined by Dr. Linovitz, he complained of worsening back and leg pain, an increasing sensation of numbness in both legs, and increasing urinary frequency. Dr. Linovitz then took X-rays, which showed that the Claimant had scoliosis and degenerative changes from L3-L5. (CX 2, p. 25.) Dr. Linovitz directed correspondence to Crawford & Company explaining the Claimant's condition and indicating that the Claimant's latest myelogram and post myelographic CT scan, done in 1998, showed a complete block due to arachnoiditis, and that

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[6] A nephrectomy is the surgical removal of a kidney.

the Claimant was still having symptoms. (CX 2, p. 28.)

On October 15, 1999, Dr. Hassanein reported that the Claimant responded very well to the Interferon that he was prescribed for his Hepatitis C. (CX 5, p. 193.) However, after the end of the therapy, he had a relapse with re-emergence of the virus. (CX 5, p. 193.) The Claimant was then instructed to restart Interferon treatment every other day for a year. (CX 5, p. 193.) Dr. Hassanein further noted that the Claimant is a kidney transplant candidate but that the use of Interferon post kidney transplant could cause rejection. (CX 5, p. 193.)

On February 8, 2001, the Claimant was seen by Dr. Steiner at the UCSD Medical Center for chronic renal failure, hypertension, calcium phosphorus status and Hepatitis C status. (EX 18, p. 735.) Dr. Steiner reported that the Claimant has about one-third of his left kidney remaining, which supplies all of his kidney function. (EX 18, p. 735.) Dr. Steiner opined that the Claimant faces the risk of deteriorating kidney function. (EX 18, p. 735.)

On February 11, 2001, Dr. Addario evaluated the Claimant again during a two-hour face to face appointment. (CX 20, p. 545.) Dr. Addario found that the Claimant continued to demonstrate evidence of a mild cognitive deficit as well as a mood and anxiety disorder. (CX 20, p. 551-52.) Dr. Addario further stated that "The combination of metabolic factors, pain disorder, and cognitive disability render him marginally employable on a psychiatric basis, and it is my impression, unemployable with a total disability when one combines all psychiatric, medical, metabolic, and orthopedic factors." (CX 20, p. 551.)

On March 6, 2001, Dr. Linovitz examined the Claimant, who complained of aching and burning in his lower back and tingling and burning in his left groin. (CX 2, p. 20.)

He also complained of numbness, coldness and burning in his left foot combined with a weak sensation in his left leg. (CX 2, p.20.) Dr. Linovitz reported that the Claimant's most comfortable position was lying on his side with a pillow between his legs. Dr. Linovitz found the Claimant's symptoms to be worsening as he only had three mobile segments in his lumbar spine, and he found the Claimant to be at great risk for developing advanced degenerative changes, stenosis and further neurologic impairment. (CX 2, p. 21.)

On March 23, 2001, the Claimant was again given a psychiatric evaluation by Dr. Franklin. The Claimant arrived late to the appointment after confusing it with another appointment with a different doctor. (EX 9, p. 281.) During the evaluation, the Claimant told Dr. Franklin that he forces himself out of the house, but that he cannot stand up for more than 15 minutes at a time, and that if he walks more than a half a mile, he cannot do anything else for the rest of the day. (EX 9, p. 278) He explained that he felt aggravated. (EX 9, p. 279.) After Dr. Franklin completed a psychiatric evaluation of the Claimant, he concluded that although the Claimant showed compulsive and schizoid personality traits (EX 9, p. 278), whatever mild deficits he might have exhibited in the past no longer appear present. (EX 9, p. 282.) Dr. Franklin emphasized that he felt Dr. Addario's reports exaggerated the Claimant's condition. (EX 9, p. 283, 288; EX 26, p. 30.)

On April 3, 2001, the Claimant was again examined by Dr. London. During that examination, the Claimant's complaints included mid back pain at the tops of his rods, constant severe back pain that is more severe on the left side, numbness and tingling over the left lower leg radiating down to the foot, and stabbing pain in his groin. (EX 7, p. 192.)

On May 7, 2001, the Claimant was again examined by Respondents' expert internist, Dr. Grodan, who found that

despite the Claimant's loss of his right kidney and injury to the left, these impairments alone were not keeping him from employment. (EX 8, p. 230.) Dr. Grodan also commented that the Claimant had improved as a result of the prescribed Interferon treatment, and that he was "puzzled" that the Claimant could not obtain authorization for the second round of therapy. (EX 8, p. 229.)

On July 18, 2001, the Claimant was again examined by Dr. Linovitz, who reported a complete block in the solidly fused L1-2 area (the area of his initial injury), mild advancing degenerative changes at the L3-4 level, and minimal insignificant stenosis. (CX 2, p. 14.) Dr. Linovitz also reported that the Claimant had traumatic arachnoiditis and that the symptoms from arachnoiditis can worsen without any anatomic change. (CX 2, p. 15.) Dr. Linovitz further stated that the Claimant had been permanent and stationary since February 13, 1997, and that his disability was attributed fully to his injury on October 13, 1986. (CX 2, p. 15.)

On August 30, 2001, Dr. Steiner sent correspondence to Mr. Aleccia, the Employer's counsel, reporting on the Claimant's medical condition. He reported that the Claimant had lost two-thirds of his remaining kidney's function, but that he was stable and would probably remain so for the next few years. (CX 3, p. 113.) He explained that the Claimant had last received Interferon treatment for his Hepatitis C condition two years ago and that the liver clinic would decide whether to recommend another course. (CX 3, p. 113.) Dr. Steiner also noted that the Claimant was suffering from spinal stenosis, which impinges upon the nerves to his legs. (CX 3, p. 113.)

On January 26, 2003, Dr. Addario reevaluated the Claimant and found some improvements in his memory function, but continued information processing difficulties and short term memory problems. (HT, p. 215.) In short, Dr.

Addario found that the Claimant suffers from depression and at the very least needs antidepressant medications, anti-anxiety medications and counseling. (HT, p. 221.) He further found that, even with such treatment, the Claimant should not be expected to be employed, as his body has too many stressful conditions that could dangerously interplay. (HT, p. 221-22.) He concluded that the Claimant's psychological condition coupled with his orthopedic and the internal medicine injuries, renders him permanently and totally disabled. (HT, p. 245.)

On February 10, 2003, Dr. Thomas J. Wegman, a psychologist, reported his findings from a six-day neuropsychological evaluation of the Claimant. (CX 21, p. 567-96.) The evaluation showed the Claimant to have mild evidence of a brain disorder, which Dr. Wegman described as "subtle cognitive impairments consistent with a postconcussive injury." (HT, p. 246.)

1. When Did the Claimant Reach Maximum Medical Improvement ("MMI")?

Permanent Status Is Valid Despite Subsequent Improvement

Many federal circuit courts have held that a claimant's condition may be found permanent, even while the claimant is continuing to receive medical treatment that is intended to improve his or her condition. The first decision to pave the way to this approach was *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). In *Watson*, the court held that the claimant's condition could be considered permanent despite evidence showing that, in the future, the claimant would undergo medical procedures likely to improve his condition. *Id.* at 653-54. The court explained that the statutory term "permanent" could be intended to consider an

employee permanently disabled when his or her condition has continued for a long period of time, and it appears to be of lasting or indefinite duration, as opposed to a condition merely awaiting a normal healing period. *Id.* at 654.

In *Air America, Inc. v. Director*, OWCP, 597 F.2d 773 (1st Cir. 1979), the court followed this approach and upheld a BRB decision that a claimant's condition was permanent even though the medical evidence indicated that "some improvement had occurred and would probably continue." *Id.* at 781-82. In *Crum v. General Adjustment Bureau*, 738 F2d 474 (D.C. Cir. 1984), the court found that a condition is permanent if it has continued for a lengthy or indefinite duration. *Id.* at 480. Similarly, in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 764 (4th Cir. 1979), the court found that a condition is permanent when it is chronic and there is no evidence of recovery within a normal healing period. *Id.* at 764.

In line with the precedent established by *Watson* and the cases that have implemented its approach to permanency, the Claimant's condition in the case at issue can be considered permanent. Although the Claimant has undergone a wide variety of medical treatments that have led to periods of improvement, such medical treatments have been intended to help correct a continuously worsening condition. Dr. Linovitz, the orthopedic surgeon and spine specialist who has treated the Claimant for approximately 15 years, testified that the Claimant's condition has not improved since the day Dr. Linovitz first saw him, July 6, 1988, but instead has declined. (CX 24, p. 6-11.)

On the first evaluation on July 6, 1988, Dr. Linovitz found the Claimant to be asymptomatic. (CX 2, p. 97.) However, as evidenced in the volumes of medical records cited in this decision and in the examples listed below, the

Claimant's overall condition continued to worsen from that point onward.

Complete Block

Approximately ten days after the Claimant's initial appointment with Dr. Linovitz, a myelogram ordered in response to the Claimant's onset of pain, showed the Claimant to have a complete block at L1-2 and narrowing disc space. (CX 2, p. 92.)

Wire Cutting into Spinal Column

On August 9, 1988, after finding that the screws and bailing wire in the Claimant's back had slipped so that the wire was cutting into the Claimant's spinal column, Dr. Linovitz performed a surgery on the Claimant, removing the Harrington-Luque instrumentation from his back and inserting a cerebrospinal fluid shunt. (CX 2, v. 1, p. 100.)

Arachnoiditis

Following the August 9, 1988, surgery, Dr. Linovitz diagnosed the Claimant with arachnoiditis, a condition that has no cure. (CX 2, p. 100.)

Scoliosis

X-rays taken on September 30, 1988, showed persistent post-traumatic scoliosis of 15 degrees (CX 2, p.77), which worsened by June 1, 1989, to scoliosis of 32 degrees. (EX 19, p. 996.) Dr. Linovitz also discovered at that time that the Claimant had developed an established pseudoarthrosis at L1-2 with progressive lateral listhesis (CX 2, p. 58.)

Dysesthesias

On June 8, 1995, Dr. Linovitz explained that the

Claimant had "constant moderate discomfort in his back and lower extremities with worsening intermittent discomfort and dysesthesias involving his anal region and leg." (CX 2, p. 36.)

Worsening Dysesthesias

On February 13, 1997, the discomfort and dysesthesias involving the Claimant's anal region and leg worsened and the Claimant suffered tingling and burning sensations down his left leg. (HT, p. 116.)

Hepatitis C

In 1997, Dr. Hassanein did a liver biopsy and found the Claimant to carry the Hepatitis C virus. (CX 5, p. 196.)

Although Respondents have cited medical records that indicate the Claimant's condition improved to some extent between July 14, 1989 and January 27, 1993, the period of improvement was related to specific symptoms and was short-lived. However, as indicated above, the Claimant's physical condition continued to worsen after his improvement period, with the onset of dysesthesias as well as his contraction of the Hepatitis C virus.

In addition to his worsening physical condition, the Claimant also showed signs of mental impairment after the improvement period. In early February 1993, it was discovered that the Claimant suffered a post-traumatic psychiatric condition (CX 8, p. 211) amounting to an organic mental disorder. (CX 1, p. 6.) Then, from 1993 until 2003, further psychological and psychiatric evaluations showed the Claimant to suffer a mild cognitive deficit, a mood and anxiety disorder, (CX 20, p. 551-52), and a dysthymic disorder. (CX 1, p. 4; CX 7, p. 206.) In other words, despite the fact that the Claimant showed improvement in certain areas physically, between 1989 and 1993, medical records from that point

onward illustrate the Claimant's worsening physical condition and newly discovered mental condition.

Dr. Linovitz's Permanent and Stationary Recommendations Are Valid

Respondents argue that because Dr. Linovitz has changed his opinion with regard to the Claimant's permanent and stationary status, his testimony is not credible. They assert that he stated in his June 8, 1995 medical report that the Claimant's condition had reached maximum medical improvement, but that in his deposition he claimed that the Claimant's condition had not improved since the day Dr. Linovitz first saw him, July 6, 1988. (CX 24, p. 6-11.)

A close review of Dr. Linovitz's explanations shows that he did not contradict himself in his permanent and stationary opinions. On June 5, 1995, Stephanie Judice of Crawford & Company, sent correspondence to Dr. Linovitz requesting that he issue a report addressing three issues, including the following issue: "Is Mr. Heavin considered Permanent and Stationary with regards to his spine and right lower extremity?" (CX 2, p. 38.) On June 8, 1995, after examining the Claimant, Dr. Linovitz sent a response to Ms. Judice wherein he answered her question as follows: "Discussion and Recommendations: It is my opinion that Mr. Heavin is permanent and stationary regarding his injuries of October 13, 1986."

At his deposition, Dr. Linovitz explained that he issued the permanent and stationary report dated June 8, 1995, based on his understanding according to California workers' compensation law. (CX 24, p. 29.) However, he explained, in applying a retrospectroscope and with the value of hindsight, as done in longshore matters, he finds that the Claimant was "destined never to improve I think from the day of the injury,

or c[illegible]nly by January 18th of 1988." (CX 24, p. 29.)

A retrospective approach can be used to determine the date of permanency, *Walsh v. Vappi Construction Co.*, 13 BRBS 442 (1981), and is appropriate in this case. Although Dr. Linovitz suggested various dates for the Claimant's permanent and stationary status, he was competent in his findings as he explained the approach he used in each instance.[7] As explained earlier in this decision, the Claimant's condition never improved from the day he first was seen by Dr. Linovitz, on July 6, 1988, but instead has continued to worsen, only improving for short periods. Therefore, I find the Claimant's permanent and stationary status began on July 6, 1988.

Lack of Worsening Condition Does Not Affect Date of Maximum Medical Improvement

Respondents argue that the X-rays and myelograms taken of the Claimant's lumbosacral spine on June 8, 1995 and February 13, 1997 did not evidence any change, and therefore failed to show a worsening of the Claimant's condition. However, Dr. Linovitz testified in his deposition that the repeat myelogram did not show any worsening of the Claimant's condition because the Claimant suffers from a complete block, a condition that cannot get any worse. (CX 24, p. 43.) He explained "It's like saying you're dead, how much worse can you get than that? I mean, the guy's got a complete block. How much worse? There is no worse." (CX 24, p. 43.) More importantly, in determining maximum

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[7] Dr. Linovitz additionally referred to the permanent and stationary dates of October 13, 1986, and January 18, 1988. However, because he was not the Claimant's treating doctor at those times, he does not have as strong a basis to demonstrate that the Claimant was permanent andstationary on either of those dates.

medical improvement (MMI), the relevant inquiry is whether the Claimant has improved, and the fact that the X-rays and myelograms failed to show any change is evidence that no improvement took place.

Varying Ratios of Pain, Numbness and Tingling Do Not Affect Maximum Medical Improvement

Respondents argue that the "pain diagrams" executed by the Claimant at the office of Dr. Linovitz on June 8, 1995 and February 13, 1997 illustrate decreased orthopedic complaints thereby showing an improvement in the Claimant's condition. However, there is no evidence in support of such a finding. In fact, during Dr. Linovitz's deposition, Mr. Aleccia commented on the "pain" diagrams as follows: "when I look at these two pain diagrams executed by your patient, it would appear to me that at best they are equal." (CX 24, p. 40.) The statement by respondents' counsel concedes that there is not any significant illustration of improvement from the 1995 diagram to the 1997 diagram. Further, a close examination of the exhibits reveals that the Claimant placed between 32 and 34 markings indicating pain and/or numbness and tingling on each of the diagrams. (EX 19, p. 889, 897.)

Although the Claimant's pain diagrams indicate that overall, his pain, numbness and tingling persisted from 1995 to 1997, the 1997 diagram illustrates a higher showing of numbness and tingling markings than pain markings. (EX 19, p. 889, 897.) As a result, Respondents claim that the diagrams are evidence that the Claimant's pain decreased. However, Dr. Linovitz explained at his deposition that, contrary to Respondents' belief, pain diagrams are not indicative of pain intensity (as there are no instructions for a patient to "put more x's" to show more pain), but instead are used to identify pain location. (CX 24, p. 39.)

The Opinion of Claimant's Treating Physician Should Be Given Great Weight

The Ninth Circuit held in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), (order revised at 164 F.3d 480 (9th Cir. 1999)), that a treating physician's opinion is entitled to substantial weight. In a very recent decision, *Peabody Coal Co. v. Director, OWCP*, No. 00-0752 BLA (6th Cir. 2003), the Sixth Circuit added that although treating physicians get the deference they deserve based on their power to persuade, "a highly qualified treating physician who has lengthy experience with a [patient] may deserve tremendous deference....." Id. (quoting *Eastover Mining*, 2003 WL 21756342, at 7.) The court then referred to the claimant's 16 years of treatment by his treating doctor, finding that the doctor's opinion was well supported by his ongoing treatment of the claimant and well documented treatment notes. *Peabody Coal Co. v. Director, OWCP*, No. 00-0752 BLA (6th Cir. 2003).

In the same regard, Dr. Linovitz's opinion that the Claimant is permanently totally disabled should be given substantial weight. Dr. Linovitz has treated the Claimant for more than 10 years, has maintained well documented treatment notes, and has presented persuasive testimony of the Claimant's condition. Moreover, Dr. Linovitz is an orthopedic surgeon specializing in spinal disorders. In addition, Dr. Linovitz testified that based on his 25 years of experience and more than 10 years of treating the Claimant, there is no chance that the Claimant was feigning his condition. (CX 24, p. 24.) Because of Dr. Linovitz's extensive experience in the field of orthopedic surgery and his history in treating the Claimant, his findings may be given greater weight than the findings of doctors who only examined or treated the Claimant a handful of times.

2. What is the Nature and Extent of the Claimant's Disability?

Nature

Disability is generally addressed in terms of whether its nature is permanent or temporary and whether its extent is partial or total. With regard to nature, the Act defines disability as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902 (10). Therefore, a claimant must demonstrate an economic loss in conjunction with a physical or psychological impairment in order to receive a disability award. *Sproull v. Stevedoring Service of America*, 25 BRBS 100, 110 (1991).

As discussed in detail above, the Claimant's condition has reached a level of permanency. A condition is permanent if it has continued for a lengthy or indefinite duration *Crum v. General Adjustment Bureau*, 738 F2d 474, 480 (D.C. Cir. 1984), or when it is chronic and there is no evidence of recovery within a normal healing period. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 764 (4th Cir. 1979). Because the Claimant's complex medical condition has continued for a period exceeding 15 years and because he also suffers from arachnoiditis, a chronic inflammation and thickening of the arachnoid layer, I find the Claimant's disability has achieved permanent status.

Extent

With regard to whether a disability is partial or total, where it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v.*

Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical and mental restrictions. *New Orleans (Gulfwide) Stevedores v. Turner* , 661 F.2d 1031 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

The claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP* , 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). However, the claimant's diligence in pursuing employment is only relevant after the employer satisfies its burden of establishing the availability of suitable alternate employment. *Roger's Terminal*, 784 F.2d at 687.

In this case, the parties agreed that the Claimant was unable to return to his previous line of work.[8] Therefore, it became the Employer's burden to establish the availability of suitable alternative employment for the Claimant. After reviewing labor market surveys, medical reports indicating

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[8] Additionally, in a letter to the Claimant from Dr. Pusateri, the doctor wrote, "It is my sincere feeling that any employer who would allow you within 100 miles of an oil rig would be bordering on insanity." (CX 9, p. 215.)

both the Claimant's physical and psychological impairments, and extensive vocational testing results of the Claimant's performance capabilities, it is clear that the Employer was unable to meet its burden. Therefore, based on the Claimant's combined physical and psychological injuries, he is rendered totally disabled.

In determining the Claimant's permanent total disability status, vocational evaluations, labor surveys, psychologist and psychiatrist reports, and medical records relating to the Claimant's physical injuries, were all considered. Overwhelmingly, the evidence showed that the Claimant is not suited to compete in the job market.

Vocational Testing

From January 22, 2003 through January 24, 2003, vocational consultant Thomas Yankowski evaluated the Claimant to determine his employment capability (CX 19, p. 502) by means of a Functional Capacity Evaluation. (CX 19, p. 518A.) Mr. Yankowski conducted a series of tests on the Claimant, in a simulated work environment, and found that the Claimant: could lift a maximum of 10 pounds from the knee level up, but could not lift any weight from the floor level; had limited range of motion of the trunk and limitations in bending and stooping; needed to hold onto furniture when standing for an extended period of time; and limped while walking. (HT, p. 313.) Following the first day of Mr. Yankowski's testing, the Claimant reported that he had chills, headaches, dry heaves and was lightheaded and weak. (HT, p. 473.) According to the Claimant, when he pushes himself a little farther than his normal daily activities, he experiences this type of pain reaction. (HT, p. 519.)

Mr. Yankowski also tested the Claimant's ability to perform sedentary work and found that the Claimant had very

low stamina, body mechanic breakdowns, and needed rest breaks at least every hour. (HT, p. 314.) The testing indicated that the Claimant's stamina would not be able to maintain constant standing and sitting for sedentary work. (HT, p. 326.) In fact, at the end of the three-day testing, the Claimant was in an extreme amount of pain. (HT, p. 315.) The Claimant's reaction to the simulated testing was a good example of how he would be affected if placed in a real job. As indicated by Respondents' expert witnesses, Dr. London and Dr. Furst, testing in a simulated work environment is a method of determining a claimant's level of functioning and may provide more information than a single evaluation. (EX 24, p. 38; EX 27, p. 64.)

Mr. Yankowski's testing also revealed that the Claimant has a low temperament for working with the public, (HT, p. 332), is unable to concentrate or follow multi-step instructions (HT, p. 325), is impaired with regard to new learning (HT, p. 325), and suffers from dyslexia and learning disabilities in the areas of spelling[9] and writing. (CX 19, p. 511.)

When Mr. Yankowski was asked whether the Claimant was capable of undermining the vocational testing process, he replied that in his 30 years of testing, no person has had the level of sophistication needed to manipulate test results. (HT, p. 386.) Mr. Yankowski further explained that his tests have integrity checks to identify persons who are faking their disability. The test results are evaluated to see if the patient's problems are consistent with the patient's medical problems and he found that the Claimant had difficulty performing tasks he was expected to have difficulty with and was able to

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[9] Mr. Yankowski's testing indicated that the Claimant's spelling ability was at the third grade level. (HT, p. 336.)

perform without difficulty those tasks that were not affected by his medical problems. He found the Claimant's difficulties were consistent with the problems they expected him to have. He explained that someone who was faking the test results would not know which tests were important to the overall outcome. (HT, p. 359.) Thus, Mr. Yankowski's testing results are a credible source of the Claimant's capacity.

After reviewing the results from all of his testing, Mr. Yankowski concluded that the Claimant was not competitively employable and explained his conclusion was based on: "..... my review of his numerous physical limitations, my review through medical reports, my own review of his functional capacities, my review of the psychological reports, the neuropsychological evaluations that have been done, my review of his employment history and my vocational testing results." (HT, p. 326; CX 19, p. 516.)

Crawford & Company scheduled a Vocational Assessment of the Claimant on November of 1995, by David Janus, a Vocational Supervisor (EX 15, p. 576-82) and a Vocational Assessment Update more recently, on July 16, 2001, by Connie Guillory, a Vocational Consultant (EX 15, p. 536-44.) In her report of 2001, Ms. Guillory arrived at many of the same results as David Janus did in 1995. Ms. Guillory found that the Claimant was able to think clearly and analytically (EX 15, p. 542), but was only able to stand for an half hour period (EX 15, p. 537), could only type 13 words per minute (HT, p. 627) and had below-average dexterity. (HT, p. 684-85.) In fact, Ms. Guillory's test results also showed parallels with the results of Mr. Yankowski's testing, and indicated that the Claimant's language usage, numerical aptitudes, and attention to clerical detail were all below average. (HT, p. 332.)

The Claimant's limitations, noted during vocational testing, were determined without consideration of his psychological limitations. Still, however, the results demonstrated that the Claimant suffers from a multitude of impairments.

Labor Market Results

Lindsey Matz, a vocational consultant for Crawford & Company, conducted two labor market surveys in the fields of data entry and customer service. (EX 15, p. 549.) These areas were chosen based on the Claimant's physical restrictions, capabilities, prior work history and transferable skills. (CX 15, p. 549.) The labor market surveys did not take into consideration the Claimant's psychological limitations, however. In fact, it was not the first time that the Claimant's psychological condition was overlooked. At trial, Respondents' counsel stipulated that neither David Janus, Lindsey Matz, nor Connie Guillory reviewed or considered the reports of Dr. Sara G. Arroyo on July 14, 1993, Dr. Stanley Terman on July 20, 1993, or Dr. Perosio on February 2, 1993 (HT, p. 644-47), the psychology and psychiatry specialists whose opinions formed the basis of the Social Security Administration's decision entitling the Claimant to disability benefits in 1994. (CX 1, p. 1-7.) This lack of consideration of the Claimant's mental disability, a significant aspect of the Claimant's background, greatly discredits the findings of Crawford & Company. However, that aside, there are still numerous inconsistencies in the findings presented by Crawford & Company.

Connie Guillory testified as to the accuracy of the labor market surveys conducted by Ms. Matz in December 1999, (EX 15, p. 549) and Mr. Janus in December 1995. (EX 15, p. 557.) However, despite her testimony, the evidence clearly demonstrates that the Claimant, due to his condition,

would be unable to perform, let alone obtain, many of the jobs identified for him in the surveys. For example, Ms. Guillory, after admitting that the Claimant was well documented as a poor speller, believed that he would be a good candidate for a position that listed the following requirement: "Must be a good speller." (EX, p. 551; HT, p. 612-13.) In addition, some of the potential positions listed were for employers that had no job openings available at the time of the survey. (EX 15, p. 549, 551, 552.) As identified below, almost all of the jobs listed as options for the Claimant required skills, experience or physical demands beyond the Claimant's capabilities.

Customer Service Agent

The customer service positions listed in Lindsey Matz's survey required six to eight hours of prolonged sitting, (EX 15, p. 549), which is beyond the capability of the Claimant (HT, p. 336.) Mr. Yankowski commented that customer service positions generally require computer literacy, attention to clerical detail, numerical abilities, typing skills and multi-tasking (HT, p. 336) but that the Claimant is not computer literate,[10] does not have the capacity to pay attention to clerical detail, has weak numerical abilities (HT, p. 336), and can type only 13 words per minute (HT, p. 321.) Additionally, Respondents' expert psychologist, Dr. Furst, tested the Claimant's ability to focus attention and found the Claimant to score in only the first percentile on the test. (EX 27, p. 22.) Therefore, a customer service agent position would not be suitable for the Claimant.

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[10] The Claimant was given a computer operations test where he was asked to do formatting and various screen jumps. According to Mr. Yankowski, "it took repeated, repeated, repeated instructions with him and he still performed below average." (HT, p. 385.)

Data Entry Worker

Ms. Guillory testified that the Claimant would be suited for a data entry position that required a multi-task oriented person with good communication skills, and stated a preference for knowledge of pharmaceutical terminology. (EX 15, p. 553; HT, p. 621) Because the Claimant has problems with multi-tasking and has no pharmaceutical knowledge, the position listed should not have been chosen as a potential opening for the Claimant. Ms. Guillory further testified that, despite the fact that the Claimant can only type 13 words per minute and has no phone experience, that he would be eligible for a data entry job that required him to be a good typist and listed a preference for one year of experience on the phone (EX 15, p. 553; HT, p. 627-28.) In fact, she responded "I am sure it would not be a problem." (HT, p. 628.)

Assembly Position

According to Mr. Yankowski, under a Department of Labor analysis, a worker must be at least in the highest third of capabilities for finger dexterity to be hired for an assembly job. (HT, p. 337.) More specifically, an assembly worker must have very fast finger manipulation. (HT, p. 337.) Both Mr. Yankowski's testing and the testing of Crawford & Company indicated that the Claimant's dexterity ranged below average due to his below average arm-hand steadiness. (HT, p. 337-38.) In fact, Connie Guillory stated that the Claimant's testing scores for manual dexterity were very low. (HT, p. 688.)

Collections Agent, Telemarketer, Front Desk Concierge, Information Clerk

These positions require dealing with the public, influencing people and making judgments, which, according to Dr. Addario, would be problematic for the Claimant. (HT, p.

332.) The Claimant expressed disgust for the positions of collections agent and telemarketer and claimed he would "go crazy" if he had to do either of those jobs. (HT, p. 338.) In addition, the Claimant felt that he would not be able to work at a front desk or information desk as he would not have the opportunity to lie down when his pain intensifies. (HT, p. 338.)

In his Labor Market Survey, Mr. Janus identified collections positions that required one year, five years, and ten years of collections experience. (EX 15, p. 558-59.) Ms. Guillory testified that, despite the fact that the Claimant has no experience in the field of collections, these jobs represented suitable alternative employment (HT, p. 638.) Ms. Guillory's failure to acknowledge that the Claimant would be unable to successfully compete for jobs requiring experience in a particular area, undermines her credibility.

Cashier

Mr. Yankowski testified that, in addition to the Claimant's limitations in terms of dealing with the public, his potential to make errors with money in a cashiering position would not be tolerated by an employer. (HT, p. 332.) Mr. Yankowski further explained the unlikelihood of the Claimant's success in this kind of job given his learning disability and his cognitive and emotional deficits. (HT, p. 333.)

PBX Operator

Mr. Yankowski explained that the position of PBX Operator requires a worker to constantly deal with multi-tasking because numerous people call at once. The worker needs to be able to take good messages, something that would be a challenge for the Claimant because of his poor spelling capabilities. (HT, p. 335.)

Parking Garage Attendant

Mr. Yankowski explained his concern regarding the placement of the Claimant as a parking garage attendant. In this position, the Claimant would not be able to take frequent breaks to use the bathroom, which would be necessary, as the Claimant has an incontinence problem. (HT, p. 365; CX 2, p. 32 .)

In summary, Mr. Yankowski found that the Claimant does not possess the necessary skills to perform the clerical jobs identified by Crawford & Company, such as cashier, telemarketer, bill collector, front desk concierge, information clerk, or PBX operator. (HT, p. 331-32.) In addition, the evidence shows that the Claimant is not capable of holding customer service or data entry positions. Mr. Yankowski's findings simply affirm the 1994 decision of the Social Security Administration, which held that the Claimant was unemployable. "Considering his maximum sustained work capability, age, education, and work experience, there are no other jobs the claimant is capable of performing which exist in significant numbers in the national economy." (CX 1, p. 6.)

Psychologist/Psychiatrist Opinions

When Dr. Addario was contacted by Crawford & Company with a list of potential jobs and job descriptions for the Claimant, Dr. Addario responded that, based on his June 25, 1997 evaluation of the Claimant's various limitations, and previous evaluations, the Claimant was not able to do any of the proposed jobs. (HT, p. 214.) His findings regarding the Claimant's limitations were given support by other treating doctors, including Respondents' expert witnesses, as discussed below.

Dr. Addario, Dr. Wegman, Dr. Franklin and Dr. Furst all agreed that the Claimant suffers from cognitive dysfunction. Dr. Addario found the Claimant to suffer from a mild cognitive deficit. (CX 20, p. 551-52.) Dr. Wegman reported that the Claimant had evidence of a mild brain disorder and described it as "subtle cognitive impairments consistent with a postconcussive injury." (HT, p. 246.) Dr. Franklin found that the Claimant demonstrated a history of mild cognitive dysfunction. (EX 9, p. 267.) Lastly, Dr. Furst found that the Claimant suffered from neurocognitive defects (EX 10, p. 309) possibly caused by chronic pain (EX 27, p. 29), depression, traumatic brain injury, or some combination of these. (EX 27, p. 31.) In fact, when Dr. Furst tested the Claimant's mental processing speed, he noted such significant impairments at the beginning of the testing that he elected not to complete the test. (EX 27, p. 22.) In addition, it should be noted that in 2001, the Claimant's creatine level, which is a reflection of the kidney's efficiency, was 3.6 as opposed to the normal level of below 1.0 (EX 14, p. 447) and according to Dr. Addario, increased creatine levels affect cognition. (HT, p. 218.)

Dr. Addario, Dr. Franklin and Dr. Furst all found that the Claimant needed to be treated for his depressive and anxious state. Dr. Addario found the Claimant to be depressed and to suffer a mood and anxiety disorder. (HT, p. 272; CX 20, p. 551-52.) Dr. Franklin suggested a trial of antidepressant medication such as Prozac or Zoloft despite stating that the Claimant did not have a diagnosis of clinical anxiety or depression. (EX 9, p. 267-68; 284.) Dr. Furst stated that the Claimant had a significant level of depression and anxiety (EX 10, p. 306) and recommended the Claimant be given authorization for psychological treatment for his "ongoing depressive disorder." (EX 10, p. 308; CX 14, p. 232.)

Dr. Addario, Dr. Furst and Dr. Linovitz all found that the Claimant underreported his depression. (HT, p. 258; EX 27, p. 61; CX 24, p. 15.) In fact, the Claimant himself did not initiate psychiatric treatment, but rather, Dr. Linovitz referred the Claimant to Dr. Addario because he felt that the Claimant was depressed. (CX 24, p. 15.) Dr. Addario explained that it is not uncommon for patients to understate their depression because they are often in denial or do not recognize the depression. (HT, p. 289-90.)

Dr. Franklin offered, strictly from a psychiatric standpoint, that the Claimant could participate in the open labor market. (EX 26, p. 46.) However, the Claimant's capabilities for employment cannot be evaluated strictly on the basis of one of his ailments. As Respondents' witness, Dr. Grodan, indicated, in order to determine if a person can compete in the labor market, the totality of the person has to be considered. (EX 25, p. 31.)

Dr. Franklin reported that the Claimant suffers chronic pain and that he does not exaggerate its extent. (EX 9, p. 265; EX 26, p. 72.) In fact, Dr. Linovitz found that on a pain scale of one to ten, the Claimant's pain level is a ten. (CX 24, p. 12-13.) However, despite Dr. Franklin's knowledge of the Claimant's severe pain and despite his admission that people who experience chronic and severe pain develop psychiatric reactions as a secondary result (EX 26, p. 82), he still failed to factor the Claimant's pain into his assessment of the Claimant's capabilities. (EX 26, p. 77.)

As illustrated above, the Claimant's and Respondents' expert witnesses agreed that the Claimant suffers from cognitive dysfunction, physical pain, psychological and psychiatric impairments including depression. Because these impairments are considerable in measure, they should have been included in the analysis of the Claimant's work-related

capabilities.

Respondents also attempted to show that the Claimant was capable of working because he volunteered on yachts in the Louis Vuitton Cup and the America's Cup races. (HT, 433-39.) However, the Claimant testified that the crew on each of the yachts knew his limitations and assigned him "little" jobs. (HT, p. 438.) The Claimant also testified "I love the water..... when I'm on sailboats I feel better than when I'm on land." (HT, p. 441.) Respondents' expert psychiatrist, Dr. Franklin, who also had experience in sailing, was asked to give his opinion of the atmosphere on a sail boat. He responded: "It is the most relaxing thing in the world. Every time I go out on a boat I say if people discovered sailing psychiatrists would be out of business." (EX 26, p. 42.) Dr. Franklin's opinion supports the Claimant's contention that his sailing trips were a form of relaxation rather than an indication that he can be gainfully employed.

Because it was uncontroverted that the Claimant could not return to his usual work, the Employer in this case had the burden of showing the existence of realistic job opportunities within the Claimant's capabilities, considering his age, education, work experience, and physical and mental restrictions. *New Orleans (Gulfwide) Stevedores v. Turner* , 661 F.2d 1031 (5th Cir. 1981); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Although Crawford & Company, the employer's carrier, attempted to demonstrate the availability of suitable alternative employment, it was unable to meet the burden. See *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Therefore, I find the Claimant's disability is total.

Even if the Employer had been able to meet its burden by identifying suitable alternative employment, the Claimant's disability would still be classified as total. Dr. Linovitz, the Claimant's treating orthopedic surgeon, and Dr. Addario, the Claimant's psychiatrist, both found that, considering the combination of the Claimant's psychiatric condition, orthopedic and internal medicine injuries, metabolic factors and pain disorders, the Claimant is totally disabled. (HT, p. 115, 214, 245; X 2, p. 32-33; CX 20, p. 551.) As discussed earlier, as an orthopedic surgeon specializing in spinal disorders who has treated the Claimant for 10 years, Dr.Linovitz's opinion is entitled to deference.

Additionally, the Claimant was totally disabled from March 13, 1998 to March 15, 1999, while he underwent Interferon treatment. Dr. Grodan, an internist and cardiologist, expressed the opinion that the Claimant was disabled from the competitive work environment during his Interferon treatments. (EX 25, p. 47.) Further, Dr. Addario stated that many patients on Interferon "have to go on total disability." (HT, p. 218.)

3. What Was The Claimant's Average Weekly Wage (AWW)?

Sections 10(a), 10(b) and 10(c) of the Act set forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. §§ 910. The first method, found in Section 10(a), applies to an employee who has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, *i.e.*,

whether it is intermittent or permanent, *Eleazar v. General Dynamics Corp.*, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978).

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), prior to his injury. 33 U.S.C. §§ 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir.1991); *Duncanson -Harrelson Co. v. Director, OWCP*, 686 F.2d1336, 1342 (9th Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101 (1983); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Gilliam v. Addison Crane Company*, 21 BRBS 91, 93 (1987). More specifically, the use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). *See generally Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 237 (1985); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982); *Holmes v. Tampa Ship Repair and Dry Dock Co.*, 8 BRBS 455 (1978); *McDonough v. General Dynamics Corp.*, 8 BRBS 303 (1978). Section 10(c) mandates that a sum which "shall reasonably represent the.....earning capacity of the injured employee" be determined. The Federal Courts and the Benefits Review Board have consistently held that Section

10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d. 85 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981). In the case at issue, Section 10(c) applies because it is the Claimant's unrebutted testimony[11] that he received a pay increase shortly before he was injured on October 13, 1986. (HT, p. 92-93.)

A calculation of average weekly wages may be based on a claimant's income tax records. *Mattera v. M/V Marie Antoinette Pacific King, Inc.*, 20 BRBS 43 (1987). In this case, the Claimant's W-2 forms for 1986 support his testimony and show that he was paid a lower salary from January 1, 1986 to June 30, 1986, than he was paid from July 1, 1986 to October 13, 1986. (CX 15, p. 267-68.) The Claimant received two sets of W-2s in 1986, as a result of the merger of Gulf Oil and Chevron. (HT, p. 95.) The first W-2, from Gulf Oil for January 1, 1986 to June 30, 1986, reflected earnings of $19,715.39 for 26 weeks of work. (CX 15, p. 268.) This amounts to weekly wages of $758.28 for that time period. The second W-2, from Chevron for July 1, 1986 to October 13, 1986, reflected earnings of $15,144.44 for only 15 weeks of work. (CX 15, p. 268.) This amounts to weekly wages of $1,009.63.

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[11] The Employer attempted to introduce Exhibit 21, a Salary Action History chart, to rebut the Claimant's testimony regarding his wages. However, the Exhibit was excluded when the Employer was unable to authenticate it, and it was determined that the chart only showed "anticipated earnings," based on the hours that an employee was expected to work (EX. 28, p. 20), instead of the employee's actual earnings. (EX. 28, p. 21.)

As illustrated by the Claimant's two W-2 forms for 1986 (CX 15, p. 267-68), and explained above, the Claimant received an increase in salary from $758.28 to $1,009.63 per week before his injury. The evidence that he indeed received a salary increase corroborates his testimony that he was promoted from "pumper gauger" to "facility operator" shortly after Gulf Oil merged with Chevron. (HT, p. 90-91.)

As noted above, a Section 10(c) computation should reflect a pay raise received shortly before a claimant's injury. *Mijangos v. Avondale Shipyards*, 19 BRBS 15 (1986); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175, 177 (1986). Because the Claimant is able to support his contention that he received a pay increase shortly before his injury on October 13, 1986, and because Respondents did not successfully present a rebuttal, Section 10(c) applies and the Claimant's average weekly wage from Chevron of $1,009.63 is to be used in calculating his benefits.

4. Is the Employer entitled to Section 8(f) relief?

Under Section 8(f) of the Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present:

(1) The injured worker had an existing permanent partial disability before the most recent injury;

(2) The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and

(3) Depending on whether the present disability is total or partial,

> (a) if the present permanent disability is total, it is not due solely to the most recent injury; or

> (b) if the present permanent disability is partial, it is materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of the pre-existing permanent partial disability.

33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director, OWCP*, 25 BRBS 85, 87 (CRT) (9th Cir. 1991); see *Director, OWCP v. Newport News Shipbldg. & Dry Dock Co.* (Carmines), 138 F.3d at 138-39.

The Respondents in this case submitted an application for 8(f) relief to the Office of Workers' Compensation Programs, dated March 27, 1998. (EX 5, p. 8-15.) The District Director denied the application in a letter dated May 7, 1998, but explained that the application met the first and second elements above, thus establishing 1) that the claimant had a pre-existing permanent impairment and 2) that the pre-existing impairment was manifest to the employer. (EX 6, p. 165.) The letter further clarified that the 8(f) application was denied solely because the contribution element had not been met. (EX 6, p. 165.) Then, in an amended application for 8(f) relief dated April 21, 1999, the Respondents again unsuccessfully attempted to obtain relief from the Special Fund. (EX 5, p. 16-164.) The District Director's May 27, 1999 letter denying the Employer's amended 8(f) application again explained that the contribution element had not been met as the employer failed to show the extent the Claimant's condition was worsened by his pre-existing impairment. (EX 6, p. 168.)

Lack of Contribution to the Ultimate Permanent Total Disability

There are two aspects to the contribution element. First, if the present permanent disability is total, the employer

must establish that the claimant's ultimate disability is not due solely to the subsequent injury. 20 C.F.R. § 702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. *FMC Corp. v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989); *Director, OWCP v. Luccitelli*, 964 F.2d 1303 (2nd Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990).

Second, when an ultimate permanent disability is only partial, the employer must establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. §702.321(a)(1). In order to determine whether this requirement has been satisfied, a fact finder must consider what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of the injury. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 185 (4th Cir. 1993).

Because the Claimant has a permanent total disability, it was the Employer's burden to establish that the Claimant's disability was not due solely to the second injury. 20 C.F.R. § 702.321(a)(1)(iv). Although the Employer attempted to prove that the Claimant's pre-existing ailments contributed to his permanent total disability, it failed to do so and presented less than persuasive medical records and testimony.

Respondents referred to medical records showing that on February 2, 1982, the Claimant was treated at Lafayette General Hospital in Lafayette, Louisiana for back pain. (EX 7, p. 189.) The medical reports indicated that the Claimant had

a five-year history of back pain (EX 5, p. 31; EX 17, p. 657-68), but showed that the back pain could be related to the Claimant's urinary and kidney problems. (EX 17, p. 657-59, 663-65, 667.) Nothing in the medical records indicated that the Claimant's back pain contributed to the disability he currently suffers as a result of the October 13, 1986 injury. In fact, after treating the Claimant on February 19, 1987, Dr. Blanda issued a medical report which referred to the Claimant's past back pain. He wrote, "I had an incident of seeing him several years ago, apparently when he came in for back pain, but as it turned out it was kidney problems." (EX 19, p. 974.) In addition, Dr. Linovitz, after reviewing the medical records, concluded that the 1982 medical record referring to "back pain," with no follow-up treatment, was not enough to show that the Claimant suffered a pre-existing back condition. (CX 24, p. 54.) Further, Dr. Linovitz opined that the back pain seemed to have been related to the Claimant's kidney problems, but also could have been related to a sciatic nerve problem. (CX 24, p. 54.)

The Respondents also contend that the Claimant's pre-existing kidney problems are the basis for 8(f) relief. It is true that the Claimant suffered renal difficulty prior to the accident of October 13, 1986. In fact, on March 4, 1982, the Claimant saw Dr. Charles Williams, who performed surgery on his right kidney and approximately a year later, on March 7, 1983, the Claimant's right kidney was removed at Lafayette General Hospital. (EX 5, p. 39.) However, again there is no indication that the Claimant's kidney problems contributed to the Claimant's current disability status.

The Respondents' own expert witness, Dr. Grodon, testified that the removal of the Claimant's kidney prior to his October 13, 1986 injury, did not significantly contribute to his present disability. (EX 25, p. 46.) He opined that the loss of a kidney does not affect a person's day to day life. (EX 25, p.

30.) He gave the following example: "You have a perfect example of people donating a kidney for transplant, and they have one kidney left, and they live normal lives..... [The Claimant] does not have a disability because of his kidneys. Even now." (EX 25, p. 30.) When asked if the Claimant's disability level would be less today if he had not had a prior nephrectomy, Dr. Grodan replied that it "would be less, but by a small increment. But it is a tiny increment compared to what happened to him." (EX 25, p. 46.)

In addition, Dr. Grodan issued a medical report on June 18, 2001, stating that the Claimant is not limited from the labor market by his liver or kidney disorder, but instead is limited due to his orthopedic limitations. (CX 4, p. 150.) Dr. Grodan further remarked that "Mr. Heavin, at the time of the accident, had only one kidney in his abdomen. If he had both kidney[s] present, considering the substantial trauma to his body, in my opinion, both kidneys would have been damaged, in all medical probability to an identical degree." (EX 8, 228.) Thus, even the Respondents' own expert expressed the specific opinion that the Claimant's pre-existing kidney problem played no role in the severity and extent of the Claimant's permanent condition.

However, despite Dr. Grodan's indications that Claimant's pre-existing kidney condition does not have any limiting effect on his current disability, Dr. Grodan testified in a conclusory manner that the Claimant's current medical condition and disability "is substantially greater than it would be from the October 13, 1986 injury standing alone....." (EX 25, p. 44.) This is the wrong standard for this case. That is the standard for a permanent partial disability. As mentioned above, the Claimant was permanently totally disabled. The test is whether or not the Claimant would have been permanently totally disabled by the injuries he suffered in his fall without his prior injuries. I have found that he was. Even if this was an

instance of permanent partial disability, Dr. Grodan's conclusory testimony would not satisfy the Respondents' burden of proof. He did not offer any basis for this statement. Dr. Grodan's contradictory statements indicate either that he was confused by this issue, or that his true opinion was articulated in the opinions he rendered in more specific layman's terms. (EX 25, p. 46.)

Another of the Respondents' expert witnesses, Dr. London, replied "Yes," when asked whether the removal of the Claimant's right kidney would render his condition materially and substantially greater than from the October 13, 1986 injury standing alone. Again, while this might be relevant to permanent partial disability, it does not apply to permanent total disability. Moreover, even if the "materially and substantially greater" test was appropriate in this case, Dr. London still failed to quantify how much of the current disability could be attributed to the kidney removal and back pain. (EX 24, p. 21.) This would lead to a denial of Special Fund Relief in a permanent partial case as well.

Because Respondents were unable to disprove that the Claimant's disability was due solely to the injury that occurred on October 13, 1986, the request for § 8(f) Special Fund relief is DENIED.

5. Is the Claimant entitled to reimbursement for the Interferon treatment he received?

As indicated above, the Claimant was diagnosed as suffering from Hepatitis C, as a result of his 48 blood transfusions. (CX 5, p. 196; CX 14, p. 229.) Dr. Hassanein prescribed Interferon treatment (HT, p. 138) and when the Claimant had the prescription filled, the authorization from Crawford & Company failed to go through. As a result, the Claimant paid for the prescription, in the amount of $1,976.29, on his credit card. (HT, p. 141-43; CX 16, p. 355.)

When the authorization was never given, nurses at UCSD provided Interferon to the Claimant at no cost, by using Interferon that had been returned to UCSD by patients who could not tolerate Interferon. (HT, p. 143.)

According to the records of Respondents' own expert in internal medicine, Dr. Grodan, the Claimant's prescribed use of Interferon was reasonable and necessary to treat his Hepatitis C. (EX 8, p. 209; EX 25, p. 28.) As such, after one year of use, his condition showed improvement. (EX 8, p. 229.) It is clear that the Claimant is rightfully entitled to reimbursement for any monies he paid to obtain the Interferon prescription. The Claimant has presented a receipt for $1,976.29, for one month's supply of Interferon and is therefore entitled to reimbursement in that amount.

It is less clear whether the Claimant should be compensated for the value of the Interferon treatment he was given for a year's time. The Claimant has stated that he seeks "reimbursement" for the value of the year's supply of Interferon, but one cannot be reimbursed for something that was never paid. Because the Claimant only paid for one month of the 12-month Interferon treatment, it is not "reimbursement" that he seeks for the other 11 months. The Claimant cites the collateral source rule as a theory by which he should be able to recover the cost of 11 months of Interferon treatment, totaling $21,739.19.

Under the collateral source rule, an injured plaintiff's tort recovery is not diminished by insurance benefits he receives from sources independent of the tortfeasor's contribution. *Friedmann v. Landa*, 573 So.2d 1255 (La.App. 4th Cir. 1991); *Weir v. Gasper*, 459 So.2d 655 (La.App.4th Cir. 1984), *writ denied*, 462 So.2d 650 (La. 1985). In other words, a plaintiff's receipt of a benefit from his or her insurance company does not relieve the tortfeasor from paying for the

cost of the injury. Under the collateral source rule, the plaintiff is able to collect two times — once from the insurance company and another time from the tortfeasor. The rule is intended to disallow a negligent party from benefiting from an injured person's insurance coverage. "The collateral source rule requires a negligent party to pay the full amount of damages suffered by the injured person without credit for amounts paid to the injured person by sources independent of the negligent party." *Blythe v. University of Oklahoma*, 2003 WL 21383927 (Okla. Civ. App. Div. 2) (2003).

Since the collateral source rule has generally applied in tort cases, it is relevant that the case at hand is not based on tort, but is instead based on workers' compensation. In *Blythe*, the court held that the collateral source rule, a well-established principle of tort law, did not apply to a workers' compensation case where a claimant requested prescription reimbursement for payments made by her insurance company. *Blythe v. University of Oklahoma*, 2003 WL 21383927 (Okla. Civ. App. Div. 2) (2003). Likewise, in the workers' compensation case at issue, the collateral source rule does not apply as the Claimant is seeking compensation for a prescription that was provided to him by UCSD.

However, should UCSD ever seek payment for the 11 months of Interferon it provided to the Claimant, Respondents will be responsible for the cost and will be required to compensate the medical facility. Any other determination would allow the Respondents to benefit from their failure to provide authorization for the Claimant's Interferon treatment in a timely manner.

It is also noted that the Respondents have also failed to authorize a second Interferon treatment, recommended by

Dr. Hassanein.[12] (EX 14, p. 449.) Because Respondents' expert witness in internal medicine also agreed that the Interferon treatment was beneficial to Claimant and believed a second dose would be appropriate (EX 8, p. 229), authorization for the second round of therapy should be given.

CONCLUSIONS

In conclusion, the Claimant, after sustaining injuries on October 13, 1986, while working for the Employer, reached maximum medical improvement on July 6, 1988. The Claimant's complex medical condition, which has persisted for approximately 15 years and includes chronic suffering, renders the Claimant permanently totally disabled. The Claimant's average weekly wage at the time of his injury was $1,009.63. The Employer is not entitled to Section 8(f) Special Fund relief.

The Claimant is entitled to reimbursement for the Interferon treatment he paid for, but he is not entitled to "reimbursement" for the 11 Interferon treatments he received from University of California San Diego Medical Center free of charge. However, if the Medical Center should ever seek payment for the Interferon it provided to the Claimant, Respondents will be required to provide compensation.

ORDER

Based on the findings and conclusions set forth above, it is hereby ORDERED that:

1. The Employer, Chevron USA, Inc. and Crawford & Company, its carrier, shall make payments to the Claimant, for

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[12] Dr. Hassanein recommended a second treatment when a liver biopsy showed the Hepatitis virus as still active in the Claimant. (EX 14, p. 449.)

temporary total disability benefits during his Interferon treatment from March 13, 1998 to March 15, 1999, based on an average weekly wage of $1,009.63 per week.

2. Chevron USA, Inc. and Crawford & Company shall make payments to the Claimant, for permanent total disability benefits for his multiple injuries, from July 6, 1988, based on an average weekly wage of $1,009.63 per week.

3. Chevron USA, Inc. and Crawford & Company shall receive credit for temporary total disability payments made to the Claimant until January 6, 1996, and for temporary partial disability payments made to the Claimant since January 6, 1996.

4. Chevron USA, Inc. and Crawford & Company shall reimburse the Claimant in the amount of $1,976.29, for the prescribed Interferon that he purchased on his credit card.

5. Chevron USA, Inc. and Crawford & Company shall pay interest on each past due unpaid compensation payment from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. § 1961 and 33 U.S.C. § 914(e).

6. The District Director shall make all calculations necessary to carry out this order.

7. Chevron USA, Inc. and Crawford & Company shall authorize all requested medical evaluations and/or treatments relating to any of the Claimant's medical conditions referenced in this decision.

8. Chevron USA, Inc. and Crawford & Company shall authorize the Claimant's treatment for his psychological/psychiatric deficiencies, including his ongoing depressive disorder.

9. Chevron USA, Inc. and Crawford & Company shall provide compensation to University of California San Diego Medical Center for the 11 Interferon treatments it provided to the Claimant, should the Medical Center seek payment.

10. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the Respondent's Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for employer shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

/s/ Jennifer Gee

JENNIFER GEE
Administrative Law Judge